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October Term, 1998

NEW YORK STATE BOARD OF LAW EXAMINERS; JAMES T. FULLER; JOHN E. HOLT-HARRIS, JR.; RICHARD J. BARTLETT; LAURA TAYLOR SWAIN; CHARLES T. BEECHING, JR.; and IRA P. SLOANE,

Petitioners,

-v.-

MARILYN J. BARTLETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that reading-impaired persons who achieve average reading levels through "self-accommodation" and without the assistance of external aids may qualify nonetheless for extra time and other accommodations under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. ("ADA") when taking a bar examination.

2. Whether the Court of Appeals erred in concluding -- in conflict with the standards set forth in Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983), Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998), and holdings in the Fifth, Eleventh, and Ninth Circuits -- that a board of law examiners was liable for compensatory damages under the ADA and the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. ("Rehabilitation Act") to an examination applicant to whom it denied testing accommodations in scrupulous reliance upon the recommendation of a leading expert on learning disabilities, and without knowledge of any purported errors in that expert's methodology.

3. Whether the Court of Appeals erred in holding -- in conflict with United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), the decisions of other federal circuits, and this Court's Spending Clause jurisprudence -- that the New York State Board of Law Examiners, an organization that does not receive or benefit from federal funds and forwards all bar application fees to the New York State Treasury, is subject to the Rehabilitation Act merely because two independent State agencies which receive federal funds pay application fees for a handful of the many thousands of applicants who take the examination each year.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-

NEW YORK STATE BOARD OF LAW EXAMINERS; JAMES T. FULLER; JOHN E. HOLT-HARRIS, JR.; RICHARD J. BARTLETT; LAURA TAYLOR SWAIN; CHARLES T. BEECHING, JR.; and IRA P. SLOANE,

Petitioners,

-v-

MARILYN J. BARTLETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The New York State Board of Law Examiners, and its current or former members and officers James T. Fuller, John E. Holt-Harris, Jr., Richard J. Bartlett, Laura Taylor Swain, Charles T. Beeching, Jr., and Ira P. Sloane, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 156 F.3d 321 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Southern District of New York is reported at 970 F. Supp. 1094 and reprinted at App. 23a. The opinion of the district court denying reconsideration is reported at 2 F.Supp.2d 388 and reprinted at App. 151a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1998 (App. 170a). Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc, which was denied on November 10, 1998 (App. 172a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., and their incidental regulations are reprinted at App. 174a.

FACTS

The New York State Board of Law Examiners is appointed by the New York State Court of Appeals to conduct, inter alia, a uniform system of examination of candidates for admission to practice as attorneys and counselors in the State of New York. N.Y. Judiciary Law §§ 53, 56, 90 (McKinney's 1998). The Board's compensation is set by the Court of Appeals, N.Y. Judiciary Law § 461, and is paid entirely from dedicated revenues (the Attorney Licensing Fund) derived from biennial

attorneys' registration fees paid by members of the New York bar under N.Y. Judiciary Law § 468-a. Pursuant to state law, persons applying for admission to practice as an attorney are required to pay an application fee into the state treasury. N.Y. Judiciary Law § 465. Such fees are paid by check made out to the Board, McKinney's 1998 New York Rules of Court § 6000.3 (22 NYCRR 6000.3), and are paid by the Board into the treasury in the month following receipt. N.Y. Judiciary Law § 465(1); N.Y. State Finance Law § 121(1).

In a handful of cases each year, the New York State Department of Education, Office of Vocational and Educational Services for Individuals with Disabilities (VESID), and the New York State Department of Social Services, Commission for the Blind and Visually Handicapped (CBVH), independent state agencies which receive federal funds, issue vouchers to handicapped bar applicants for payment of the bar examination application fee. Recipients of these vouchers submit them to the Board. Following redemption of the vouchers by VESID and CBVH, the Board forwards those payments to the Treasury.

Acutely aware of its duty to evaluate applications for the New York State bar examination in strict accord with applicable disabilities laws, the Board has employed Dr. Frank Vellutino, a nationally-recognized expert in reading and learning disabilities, to assess claims of reading disability by exam applicants since 1987. Dr. Vellutino designed a method of assessment based upon an applicant's scores on portions of the Woodcock Reading Mastery Test-Revised, an industry standard in measurement of reading disabilities. That method was specifically designed by Dr. Vellutino to be overinclusive -- that is, to err generously to the benefit of applicants in evaluating questionable claims. Prior to the matter at bar, this method, and Dr. Vellutino's expertise in learning disabilities, were recognized by various federal and state courts as worthy of judicial deference. See Argen v. New York State Board of Law Examiners, 860

F.Supp. 84, 90-91 (W.D.N.Y. 1994) (acknowledging Vellutino's expertise in learning disabilities and accepting Woodcock methodology); Pazer v. New York State Board of Law Examiners, 849 F.Supp. 284 (S.D.N.Y. 1994) (acknowledging Vellutino's expertise); Hiller by Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F.Supp. 958 (N.D.N.Y. 1990) (same).

Plaintiff Marilyn Bartlett, having enjoyed previous academic success despite reading difficulties,[1] entered Vermont Law School in 1988 and, following receipt of several accommodations for a claimed learning impairment in her second and third years, graduated in May 1991 with a grade point average of 2.32 and a class standing of 143 out of 153. Seeking admission to the New York Bar and claiming to be suffering from dyslexia, Ms. Bartlett applied for but, following review of her application in accordance with Dr. Vellutino's methodology, was denied special testing accommodations for the July 1991, February 1993, and July 1993 examinations. Though supported by statements from her treating psychologist, Bartlett's claims of dyslexia were, in Dr. Vellutino's opinion, not borne out by her test scores on the Woodcock examination. Ms. Bartlett failed the bar examination four times between July 1991 and February 1993, with scores ranging from 563 to 615. (A passing score is 660.)

Bartlett commenced the instant action before the District Court for the Southern District of New York in July 1993,

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[1]Ms. Bartlett received a B.S.Ed. from the State College at Worcester, Massachusetts, with a grade point average of 2.10; she received a M.Ed. from Boston University in 1976 with a grade point average of 3.8, and a Ph.D in Educational Administration at New York University in 1981. She received no accommodations at Worcester State or Boston University; NYU granted her several accommodations without requiring documentation of a disability. See infra, App. 29a - 30a.

alleging among other things that defendants' rejection of her application for special accommodations in taking the bar examination violated Title II of the ADA and the Rehabilitation Act. Following a stipulation among the parties providing for a grant of accommodations during the July 1993 exam, plaintiff failed with a score of 597; she also failed the Pennsylvania bar exam, despite accommodations, in July 1993.

Following a twenty-one day trial, the district court (Sotomayor, U.S.D.J.), issued a lengthy decision in July 1997 which concluded that plaintiff suffered not from dyslexia, but from automaticity and other reading problems which, though not causing a substantial impact on the major life activity of reading under Title II of the ADA, substantially affected her ability to "work" as a lawyer and entitled her to accommodations in taking the exam. In reaching this conclusion, the court made several significant rulings of first impression, including findings that (1) the Board was subject to the Rehabilitation Act because it received application fees from state agencies funded by federal entitlement programs, although the Board neither retained application fees for its own use nor received any form of federal assistance (App. 70a - 71a); and (2) Bartlett's ability to read at an average rate despite automaticity and phonological processing problems through techniques of "self-accommodation" rendered her ineligible for accommodations for a reading disability under Title II (App. 74a - 76a, 112a, 133a; App. 14a).[2]

In reaching these conclusions, the district court noted on numerous occasions its conviction that the Board had acted with eminent reasonableness and without intent to discriminate in its

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[2]The district court further ruled that independent testing entities such as the Board, subject to regulations issued by the Justice Department under Title II and Title III of the ADA, are also subject to regulations issued to employers by the EEOC under Title I (App. 76a, 152a - 157a).

treatment of plaintiff's application. It held that, inter alia, (1) the Board acted reasonably in employing Dr. Vellutino, a widely recognized expert in learning disabilities, to review accommodations requests (App. 112a); (2) the Board and its expert employed a reasonable methodology, based on scores on the Woodcock, to determine whether an applicant was learning disabled vis-a-vis the average public (App.112a); (3) plaintiff's entitlement to accommodations was not defined with sufficient specificity under the law, entitling Board members to dismissal of the action against them in their individual capacities on grounds of qualified immunity (App. 132a); (4) the court "had to go to extraordinary lengths to determine whether plaintiff was substantially impaired under the law," and it would be inappropriate to conclude that defendants had acted unreasonably in finding that plaintiff was not disabled under the law (App. 133a); and (5) any resulting bias against learning disabled applicants was unintentional (App. 109a).

In spite of these findings, the district court awarded $12,500 in damages to compensate plaintiff for the costs of taking the bar examination without accommodations. Observing that such an award required a showing of intentional discrimination, the court found that that requirement was satisfied upon a showing that plaintiff had been intentionally denied accommodations that a court subsequently found to be required (App. 140a - 141a).

On defendants' appeal, the Court of Appeals for the Second Circuit modified the district court's holdings in several respects. Determining that the Board (and the district court) should have analyzed the scope of Bartlett's reading impairment without consideration of her techniques of self-accommodation, the Court concluded that plaintiff was substantially limited in the

major life activity of reading under Title II (App. 15a -16a).[3] It further held, in agreement with the district court, that the Board was covered by the Rehabilitation Act under federal regulations passed following the enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (CRRA) (App. 17a - 18a).

Lastly, the Court of Appeals affirmed the award of compensatory damages against the Board, albeit on different grounds (App. 19a - 20a). Noting that intentional discrimination under the Rehabilitation Act "does not require personal animosity or ill will", and may be inferred when a policymaker has acted "with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result" from the challenged policy or custom (App. 20a, citing Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 [D. Ariz. 1996]),[4] the court found that the Board exhibited deliberate indifference -- and hence discriminatory intent -- through Dr. Vellutino's selection of a methodology for assessing claims of reading disability (App. 20a).[5]

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[3]In light of this finding, the Court of Appeals declined to reach the issue of whether the EEOC's Title I regulations were applicable in an action where, as here, the defendant was not the plaintiff's employer (App. 14a).

[4]In its initial Order, the Court of Appeals did not cite and apparently overlooked the substantial modification of the district court's analysis of the Title II standard in Ferguson by the Ninth Circuit shortly before issuance of the decision in this matter. See Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998) (application of "deliberate indifference" standard to Title II and Rehabilitation Act claims was contrary to Supreme Court precedent; "compensatory damages are not available under Title II or § 504 absent a showing of discriminatory intent").

[5]The Court of Appeals remanded this matter to the district court to establish a final award of damages.

On November 10, 1998, the Court of Appeals denied defendants' motion for rehearing with a suggestion for rehearing in banc (App. 172a).

REASONS FOR GRANTING THE WRIT

This petition addresses three significant issues arising from the application of federal anti-discrimination statutes to persons sitting for professional examinations who claim to suffer from reading and learning disabilities.[6] In Sutton v. United Air Lines, 130 F.3d 893 (10th Cir. 1998), cert. granted, __ U.S. __ (January 8, 1999) (No. 97-1943), the Tenth Circuit concluded that a pilot whose impaired vision is restored to 20/20 by the simple expedient of glasses or contacts is not substantially limited in the major life activity of seeing. See also, Murphy v. United Parcel Service, 141 F.3d 1185 (10th Cir. 1998), cert. granted, __ U.S. __ (January 8, 1999) (No. 97-1992) (considering effects of medication in evaluating impact of impairment of high blood pressure). In so doing, the court rejected EEOC guidance and authority from other circuits which directed that the effect of impairments be measured without including the mitigating effects of such commonplace aids. 130 F.3d at 901-02. That approach, the Tenth Circuit reasoned in Sutton, violated the ADA's requirement that limitations caused by impairments be measured by their actual, rather than their hypothetical, effects upon the lives of individuals. Id. The case at bar presents a related, but more extreme, example of such hypothetical effect. The Second Circuit in this matter concluded that it should disregard plaintiff's self-accommodation in overcoming the effects of a reading impairment even though the self-accommo-

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[6]We have not raised the issue of subject matter jurisdiction in this petition, since we did not raise the issue in the court below. See, Pennsylvania Department of Corrections v. Yeskey, 118 S.Ct. 1952, 1956 (1998). However, we note our general belief that the Eleventh Amendment precludes enforcement of the ADA in federal court against the State or its agencies.

dation did not involve external aids, such as glasses or medicines. It thus required that accommodations be provided to a person who can read at an average level without any form of external facilitation. Because that conclusion is contrary to the language and purposes of the ADA and Rehabilitation Act and has substantial implications for the applications of those Acts to persons claiming reading and learning disabilities, this Court should grant certiorari.

A second issue addressed in this matter concerns a conflict among the circuits as to the proper standard for an award of compensatory damages under the Americans With Disabilities Act and the Rehabilitation Act. In its recent holding in Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998), the Ninth Circuit opined that compensatory damages are not available under Title II or the Rehabilitation Act upon a mere showing of deliberate indifference -- a position in direct conflict with the holding of the Second Circuit in this matter, which treated the finding of discriminatory intent to be satisfied by a showing of deliberate indifference to plaintiff's rights. Moreover, in justifying its finding of deliberate indifference by citing errors in Dr. Vellutino's testing methodology, the Court of Appeals improperly imposed a de facto standard of absolute liability upon the Board for the accuracy of the scientific opinions of its expert. We ask this Court to grant certiorari to resolve this conflict and establish the proper standard for the award of compensatory damages in Title II and Rehabilitation Act actions.

Finally, this case concerns the reach of the Rehabilitation Act to entities which neither directly receive nor indirectly benefit from federal funding. This Court made clear in United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597, 607 (1986), that the Act, based upon the Spending Clause, "covers those who receive the aid, but does not extend as far as those who benefit from it." It reached this

conclusion after an analysis based on contract principles developed in this Court's Spending Clause jurisprudence -- including the availability of notice to the spending recipient of its obligations under federal law, the opportunity to escape that obligation by rejecting federal largesse, and the power of federal authorities to withhold funding in the event of noncompliance with federal law. 477 U.S. at 605-06; see also, Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633, n. 13 (1984) (grantees of federal funds required to bear cost of providing employment to handicapped as quid pro quo for receipt of federal funds). In holding that the Rehabilitation Act applies to an organization such as the Board, which neither receives nor expends nor utilizes federal funds in any manner, simply because federal aid has been "extended" to it by another, federally-funded person or entity for transfer to the state fisc, the Court of Appeals disregarded Paralyzed Veterans, ignored those long-established Spending Clause principles, and removed a substantial and necessary limitation on the scope of the Rehabilitation Act and similar statutes. We respectfully submit that it should grant certiorari in the instant matter to resolve the conflicts arising over that important question.[7]

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[7]Addressing a similar issue, this Court granted certiorari this Term to consider whether Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq., applied to an organization that does not receive federal funding assistance but received payments from member organizations that received such funding. National Collegiate Athletic Association v. R.M. Smith, 139 F.3d 180, cert. granted, 119 S.Ct. 31 (1998) (No. 98-84, argued January 20, 1999).

I.

THE AWARD OF ACCOMMODATIONS TO AN APPLICANT ABLE TO READ AT A NORMAL LEVEL DESPITE AN IMPAIRMENT CONFLICTS WITH THE TENTH CIRCUIT'S HOLDINGS IN SUTTON AND MURPHY AND IS IN TENSION WITH THE LANGUAGE AND PURPOSES OF THE ADA AND REHABILITATION ACT.

To qualify for accommodations under the ADA, an impairment must substantially limit a major life activity -- that is, render the sufferer "unable to perform a major life activity that the average person in the general population can perform", or cause her to be "significantly restricted as to the condition, manner or duration under which [she] can perform a particular major life activity as compared to [the average person]." 29 C.F.R. §1630.2(j)(1)(1997); 42 U.S.C. § 12102(2)(A); 28 C.F.R. Pt. 35, App. A, Pt. 36, App. B. By definition, a person suffering from a reading impairment who has developed self-accommodating techniques which allow her to read at a speed and in a manner comparable to that of an average person does not fit this definition. Such a person performs within the normal range of the general population -- the norm set forth as the basis for comparison in Title II -- without any form of external facilitation, and present no occasion for discrimination or denial of the "benefits of the services, programs, or activities of a public entity" available to others who perform within the normal range (42 U.S.C. § 12132). There is no cause or justification for providing such a person with the protections or advantages of the ADA or the Rehabilitation Act to permit or require a performance beyond that average level, or to permit access to public benefits in a manner more advantageous than that available to the average person.

Earlier this Term, this Court granted certiorari in two matters from the Tenth Circuit which make a similar point. See, Sutton v. United Air Lines, 130 F.3d 893 (10th Cir. 1997), cert. granted, __ U.S. __ (January 8, 1999) (No. 97-1943); Murphy v. United Parcel Service, 141 F.3d 1185 (10th Cir. 1998), cert. granted, _ U.S. __ (January 8, 1999) (No. 97-1992). In Sutton, the Court of Appeals held that a person suffering from nearsightedness should be examined with the mitigating measure of glasses or contacts when considering whether the impairment substantially limits a major life activity. 130 F.3d at 901-03. Likewise, in Murphy, that same court held that a person impaired by high blood pressure should be required to show the limitation of major life activity with medication which alleviated its effects. 141 F.3d at 1185. Other courts have reached similar results. See Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, 511 U.S. 1011 (1994) (person with vision correctable to 20/60 with glasses is not handicapped under Rehabilitation Act); Gaddy v. Four B Corp., 953 F.Supp 331, 337 (D. Kan. 1997) (to hold correctable condition to be disability is "to read out of the act's first definition of disability the requirement that it applies only to those persons who are 'substantially limited' in major life activities"); Schluter v. Industrial Coils, Inc., 928 F.Supp, 1437, 1445 (W.D. Wis. 1996) (diabetic who can control condition with insulin is not substantially limited by impairment).

The logic of these holdings is uniform and persuasive: in cases where an impairment may be mitigated by commonplace measures -- such as glasses, medications, or other forms of accommodation -- the failure to take such devices into account effectively relieves applicants of their statutory duty to demonstrate a substantial limitation in the conduct of their major life activities. Although EEOC regulations, Justice Department

guidelines,[8] and the majority of the federal circuits addressing the issue[9] have adopted positions consistent with the Second Circuit's ruling, the consequences of that view catalogue the harms which ensue from the failure to hold laws to mean what they say:[10] it ignores the language and logic of the statute, requires analysis of disabilities based on the fiction of limitation

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[8] See, 29 C.F.R. § 1630, App. § 1630.2[j][2], par. 8:

> The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

See also 28 C.F.R. Pt. 35, App. A (Justice Department guidelines applying similar standard to Title II cases).

As the Tenth Circuit noted in Sutton, this regulatory language is self-contradictory, in direct conflict with the statute, and inconsistent with other portions of the EEOC's Interpretive Guidance. 130 F.3d at 902. Moreover, as this Court has often observed, "the reach of Title VI's protection extends no further than the Fourteenth Amendment." United States v. Fordice, 505 U.S. 717, 732 n.7 (1992). Consequently, federal regulations implementing Title II must be interpreted to afford impaired persons opportunities no greater than those warranted by the constitutional principle of equal protection and no greater than their impairment actually demands.

[9] See, e.g., Arnold v. United Parcel Service, Inc., 136 F.d. 854, 866 (1st. Cir. 1998) (diabetes); Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 936-37 (3d Cir. 1997) (epilepsy); Gilday v. Mecosta County, 124 F.d. 760, 762-64 (6th Cir. 1997); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), cert. denied, 118 S. Ct 693 (1998) (vision limitations); Holihan v. Lucky Stores, Inc., 87 F.d. 362, 366 (9th Cir. 1996), cert. denied, 117 S.Ct. 1349 (1997) (work-related stress); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996) (Graves' disease).

[10] See Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in A Matter of Interpretation 3, 18 (Gutmann ed., 1997).

rather than its reality, leads to absurd results,[11] and is inconsistent with the ADA's general goal of requiring accommodations to the extent necessary to mitigate the actual effect of impairments and to permit those suffering impairments to perform at the level of the average population.[12] In this case -- where plaintiff's impairment was relieved in a fashion that does not rely on the "mitigating measures such as medicines, or assistive or prosthetic devices" referred to in regulations and legislative history (see 29 C.F.R. § 1630, App. § 1630.2[j][2]) -- the failure to consider such self-accommodation is especially inappropriate.

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[11]For example, this standard would appear to permit a myopic bar examination applicant, able to read at a normal though unexceptional rate with glasses, to assert a claim of disability and demand extra time in taking the exam. See also Smith v. Horton Industries, Inc., (D.S.D. 1998) (observing the unfairness of the conclusion, implicit in Doane, "that uncorrected vision due to the aging process would translate to a disability within the meaning of the ADA"); Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 469 (5th Cir. 1998) (noting that cases which have required mitigating measures to be taken into account, though contrary to EEOC guidelines, "offer the most reasonable reading" of the ADA).

[12]While there is support in the legislative history of the ADA for the view that medication and other mitigating provisions should not be considered in evaluating a disability, see H.R. Rep. No. 101-485(II) at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 (Education and Labor Committee Report), H.R. Rep. No. 101-485(III) at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451, the congressional perspective is not wholly consistent on the subject. See, e.g., S.Rep. No. 101-116, at 23 (1989) (Senate Labor and Human Resources Committee Report) (in discussion of protections for persons "regarded as" impaired, noting that persons with "medical conditions that are under control" do not currently limit major life activities). In any event, as the Tenth Circuit noted in Sutton, such authority is in direct conflict with the text of the ADA, which requires that a person claiming a disability actually show a substantial limitation caused by the impairment. See 130 F.3d at 902-03.

II.

IN FINDING THAT THE BOARD WAS GUILTY OF INTENTIONAL DISCRIMINATION BY ACTING WITH "DELIBERATE INDIFFERENCE" TOWARDS PLAINTIFF'S STATUTORY RIGHTS, THE COURT OF APPEALS IGNORED THE STANDARDS SET FORTH IN GUARDIANS ASSOCIATION, FERGUSON, AND GEBSER AND ERRONEOUSLY IMPOSED A STANDARD OF STRICT LIABILITY UPON THE BOARD.

The Ninth Circuit's recent holding in Ferguson v. City of Phoenix, 158 F.3d 668 (9th Cir. 1998) (imposition of "deliberate indifference" standard in Title II and Rehabilitation Act claims is contrary to Supreme Court precedent; "compensatory damages are not available under Title II or § 504 absent a showing of discriminatory intent"), buttressed by holdings in the Fifth and Eleventh Circuits,[13] stands in direct conflict with the Court of Appeals award of damages upon a finding of intentional discrimination through deliberate indifference on the part of the Board. Although this Court has not directly addressed that issue, it has held that compensatory damages are unavailable in a private cause of action under Title VI of the Civil Rights Act of 1964 -- the source of remedies for both the Rehabilitation Act and Title II -- without a showing of intentional discrimination. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983); Alexander v. Choate, 469 U.S. 287, 293 (1985); see also, 42 U.S.C. § 12133 (Title II remedies are coextensive with those available under Rehabilitation Act); Rehabilitation Act § 505(a)(2) (providing for enforce-

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[13] See, Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992) (compensatory damages not available for unintentional violations of the Rehabilitation Act); Carter v. Orleans Parish Pub. Schs., 725 F.2d 261 (5th Cir. 1984) (same).

ment of section 504 through the "remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964"). Yet in light of this Court's holding in Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998) -- finding compensatory damages available to a student in a private action under Title IX of the Education Amendments Act of 1972 upon showing of educator's deliberate indifference to improper discrimination -- the scope of the standard announced in Guardians Association is currently unclear. See Canutillo Independent School District v. Leija, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S.Ct. 2434 (1997) (Title VI is "model" for Title IX). We submit that this Court should grant certiorari to resolve this conflict and clarify this standard.

Moreover, even in the event that a demonstration of intentional discrimination is unnecessary to support an award of compensatory damages under Title II and the Rehabilitation Act, the Court's guidance is urgently needed to clarify the precise showing required for such an award. A range of requirements might be appropriate in such a case. See, e.g., Pandazides v. Virginia Board of Education, 13 F.3d 823, 830 n 9 (4th Cir. 1994) ("intentional discrimination" required under section 504 does not require discriminatory animus, but rather "is synonymous with discrimination resulting in 'disparate treatment'"); Farmer v. Brennan, 511 U.S. 825 (1994) ("deliberate indifference" equated with criminal recklessness in Eighth Amendment context); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-69 (1977) (outlining factors establishing discriminatory intent under the Equal Protection Clause). In Gebser, this Court set a high standard for recovery of compensatory damages under Title IX for the sexual harassment of a student by one of the district's teachers, requiring proof that a district official with authority to institute corrective measures (1) had actual notice of the teacher's misconduct and (2) failed adequately to respond to the misconduct. Whether a

similar standard should apply to Title II and the Rehabilitation Act is an important and undecided question.

By any standard, however, the Court of Appeals erred substantially in awarding compensatory damages against the Board in a manner which expressly disregarded the district court's findings of fact. Following a lengthy trial, with extensive expert testimony and review of a broad array of literature on the subject of learning and reading disabilities, the district court concluded that Dr. Vellutino's theories on learning disability were "perfectly rational" (App. 112a); that his methodology for identifying reading disabilities vis-a-vis the average person -- to our knowledge, the only standard required by any court prior to the matter at bar -- were rational and effective (App.112a); and that plaintiff had failed to prove "that the Board *intentionally* discriminated against applicants with learning disabilities or against plaintiff herself" (App. 112a, emphasis in original). Moreover, following its review of extensive evidence of the current state of theory and research on learning disabilities, the district court held that the Board's actions were undertaken in the context of a high degree of uncertainty -- indeed, "chaos" -- in that field (App. 111a - 112a, 133a), and noted that it "had to go to extraordinary lengths to determine whether plaintiff was substantially impaired under the law" (App. 132a). Finally, in dismissing the claims against Board members in their individual capacity on grounds of qualified immunity, the district court concluded that the Board's conduct in denying plaintiff's requests for accommodations was "objectively reasonable," and that reasonable board members would not have known that their actions violated plaintiff's established constitutional right (App. 132a - 133a).

While it did not dispute these findings, the Court of Appeals found the Board liable for compensatory damages under both the ADA and the Rehabilitation Act by a simple alternative expedient: holding the Board strictly liable for the

methodology and scientific understanding of its expert, Dr. Vellutino, as applied to this case (App. 20a):

> In this case, the Board implemented a policy of denying accommodations to any learning disabled bar applicant who achieved scores above the 30th percentile on the Woodcock Word Attack and Word Identification tests. As the evidence showed at trial, however, one third of adults with dyslexia scored above that percentile on similar tests. Moreover, the Woodcock, unlike the bar examination, is untimed. Consequently, the Woodcock is unreliable in measuring a disability commonly manifested in part by a deficient reading rate. Nevertheless, based on that measure, the Board repeatedly denied Dr. Bartlett's requests for accommodations. We conclude that implementing such a policy constituted deliberate indifference to a strong likelihood of violating Dr. Bartlett's federally protected rights.

This analysis substantially miscomprehends the meaning of the term "deliberate indifference", and imposes an unprecedented supervisory responsibility upon the Board for the actions and the documented scientific conclusions of its acknowledged experts. Such an imposition is unwise as a general matter and highly unjust under the facts of this case. For example, the court's conclusion that one-third of dyslexic adults score above the 30th percentile on a test "similar" to the Woodcock derives from a brief aside in a 1992 article published in a scholarly journal, describing the method of selection of thirty-nine adult subjects for a study of a test know as the Wide-Range Achievement Test-Revised (WRAT-R).[14] The Woodcock is not mentioned

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[14] See, Maggie Bruck, "Persistence of Dyslexics' Phonological Awareness Deficits", 28 Developmental Psychology No. 5, 874, 877 (1992).

in the article -- and more importantly, plaintiff neither alleged nor proved that the Board was aware of this study prior to trial. In contrast, the record fully supports Vellutino's contention that the 30% cut-off on the Woodcock was based on well-accepted understanding of the scope of learning disabilities in the general public, and was designed to be over-inclusive and to permit accommodations to all truly learning disabled candidates (App.55a - 57a).

Likewise, the Court of Appeals' cursory conclusion that the Woodcock was "unreliable in measuring a disability manifested in part by a deficient reading rate" (App. 20a) ignores the ample evidence in the record that the Woodcock is a well-established measure of such disabilities. See, e.g., Argen v. New York State Board of Law Examiners, 860 F.Supp. 84, 90-91 (W.D.N.Y. 1994). Indeed, even the district court found the method to be adequate to measure a reading disability vis-a-vis the general public, despite its generous time constraints (App. 112a). More to the point, the Court of Appeals made no finding that the Board was aware of such purported unsuitability. Nowhere does it suggest that the Board adopted Dr. Vellutino's methodology with a belief other than that it represented the most accurate method available to identify impairments.[15] Under these circumstances, this Court's finding of intentional discrimination in this matter eviscerates the standard set forth in Gebser, and imposes a far greater duty on defendants than the statutes permit.

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[15]Notwithstanding the contrary suggestion of the Court of Appeals (App. 16a), the Woodcock's purported unsuitability for measuring plaintiff's impairment is not self-evident from its untimed format. A slow reader -- even an intelligent and educated slow reader -- simply does not require accommodations under the Act without a showing of impairment. The court's holding conflates the establishment of the existence of an impairment -- the Woodcock's purpose -- with ascertainment of an impairment's effects.

This erroneous ruling is of no minor consequence. In imposing liability upon board members for the evaluations of medical experts in the field of learning disabilities, an area rife with disagreement over methods and analysis, the Court of Appeals has left examining officers with a Hobson's choice: assume the risk of liability associated with a trial court's rejection of a well-intentioned and carefully-planned expert method, or lower review standards to accept even marginally valid claims of disability.[16] That choice will cast a chill upon professional testing authorities seeking to maintain quality and fairness in the administration of accommodation requests and will severely hamper any independent review of assessments of learning disabilities made by the applicant's own clinicians. Such a result, we submit, is inconsistent with both the public interest and the goals of the ADA and Rehabilitation Act.

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[16]As reported in one contemporary account of the Court of Appeals decision ("U.S. Court Upholds Aid for the Disabled on State Bar Exams", New York Times, September 16, 1998, A1, at B12, col 4):

> "The most significant thing about the case, in terms of practical impact, is the finding that these professional bodies should not be second-guessing the determinations of learning disabilities made by the applicant's own clinicians," said Sid Wolinsky, a lawyer with Disability Rights Advocates in Oakland, Calif., who represents the learning disabled students in [a] California case.

III.

THE SECOND CIRCUIT'S HOLDING THAT THE BOARD IS COVERED BY THE REHABILITATION ACT BECAUSE FUNDS RECEIVED BY OTHER STATE AGENCIES WERE "EXTENDED" TO THE BOARD FOR TRANSFER TO THE TREASURY IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN PARALYZED VETERANS, CONGRESSIONAL INTENT EXPRESSED IN THE CRRA, AND THE PRINCIPLES GUIDING THIS COURT'S SPENDING CLAUSE JURISPRUDENCE.

In Paralyzed Veterans, this Court directly addressed the question whether Section 504 of the Rehabilitation Act -- which prohibits discrimination against handicapped persons in any program or activity "receiving Federal financial assistance," 29 USC § 794 -- applies to entities which, though not direct recipients of federal aid, benefited indirectly from the use of that aid by others. 477 U.S. at 606. This Court answered in the negative, concluding that "Section 504 . . . draws the line of regulatory coverage between the recipient and the beneficiary," and "covers those who receive the aid, but does not extend as far as those who benefit from it." 477 U.S. at 607. The grounds for that conclusion lay in the constitutional parameters applied to the Spending Clause (477 U.S. at 605-06):

> Under the program specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipient of the funds: the recipient's acceptance of the funds triggers coverage under the non-discrimination provision. . . . By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds.

In 1988, responding to this Court's holding in Grove City College v. Bell, 465 U.S. 555 (1984) (college financial aid program, but not college itself, was recipient of federal financial assistance when some students received federal basic educational opportunity grants under alternative disbursement system), Congress enacted the CRRA to clarify that entities receiving federal financial assistance are covered by the Rehabilitation Act and similar statutes on an institution-wide basis, rather than in a manner limited to the programs for which those institutions received aid. S. Rep. No. 100-64, at 6, 18. In passing the CRRA, Congress specified that the Act "addresses only the scope of coverage under [the program-specific statutes] of recipients of federal financial assistance," does 'not change in any way who is a recipient of federal financial assistance," and "does not overrule or alter the Supreme Court ruling in [Paralyzed Veterans]." S. Rep. No. 100-64, at 30-31; accord 134 Cong. Rec. S2735 (March 22, 1988 (Sen. Rudman); id. H567, H577, H583 (May 2, 1988) (Reps. Hawkins, Fish, and Edwards). It thus made clear that the intent of the statute was to clarify the scope of coverage within institutions, not to expand that coverage to institutions not covered under prior law.

Despite these legislative admonitions, the Court of Appeals held the Board subject to, and liable under, the Rehabilitation Act, noting that regulations pursuant to the CRRA expanded the definition of "program or activity" to include not only a state or local entity originally receiving assistance, but also each department or agency to which it "extend[s]" such assistance (App. 18a, citing 29 U.S.C. § 794[b][1][B] and 45 C.F.R. § 84.3[f]). The Court of Appeals concluded (App. 18a):

> [A]lthough there is nothing in the record to indicate that the Board ever actually elected to accept federal funds, the lack of such evidence is immaterial. Likewise, it is not relevant whether the Board directly

> receives federal assistance or benefits from such assistance by way of subsidy. The Board is bound by the Rehabilitation Act simply because two state entities, VESID and CBVH, elected to receive federal funds and then extended that assistance to the Board in the form of vouchers for handicapped bar applicants.

The court's dismissal of the principal considerations employed by this Court to evaluate the scope of the Rehabilitation Act in Paralyzed Veterans -- the identity of the recipient of federal funds, the power to reject such funds, and the opportunity to withhold such funds to assure compliance with federal law -- is an abrupt and unwarranted departure from this Court's precedent. By viewing such factors as immaterial and not relevant, the Court of Appeals has given the Rehabilitation Act "almost limitless coverage", and eliminated the contractual underpinning of the Act intended by Congress -- precisely the result which Paralyzed Veterans sought to avoid. 477 U.S. at 605, 608.

Nor was the Second Circuit's conclusion warranted by this Court's holding in Grove City that a college may be covered by Title IX by virtue of its students receipt of federal tuition grants (App. 17a). That holding was based on this Court's conclusion that Congress had designed the 1972 educational grant program to benefit universities as well as students. 465 U.S. at 565-570. There is no comparable finding in this case -- indeed, as we have noted, the CRRA was expressly designed without the intent to broaden further the definition of aid recipients.

Finally, the Court of Appeals holding cannot be justified as mere application of a federal regulation. It is a commonplace that federal regulations must be read to conform with this Court's precedent. Yet in holding that aid was "extended" to the Board merely because a few bar applicants each year receive

assistance through VESID and CBVH,[17] the court simply abdicated this judicial responsibility and ignored the intention of Congress in enacting the CRRA.

The error of the Court of Appeals is far from trivial. The regulatory language relied upon by the court in reaching its decision is applicable to any public or private agency, entity, or person to which federal assistance is directly or indirectly "extended". Consequently, the court's holding would enlarge the reach of the Rehabilitation Act to include a host of institutions which do not receive federal funds, but merely participate in the transmission or expenditure of federal program funds at some stage remote to their actual receipt. Moreover, that regulatory language -- "to which [or whom] Federal financial assistance is extended directly or through another recipient" -- is included in more than sixty federal regulations implementing antidiscrimination statutes, including Title VI, section 504, the ADA, and the Age Discrimination Act of 1975.[18]

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[17]According to the Board's records, only fifty (0.066%) of the more than seventy-five thousand bar application fees forwarded to the Treasury for examinations between February 1993 and February 1999 were financed through VESID or CBVH funds.

[18]See, 5 CFR § 900.403 (Office of Personnel Management; Title VI); 5 CFR § 900.703 (Office of Personnel Management, handicap discrimination); 7 CFR § 15.2 (Department of Agriculture; Title VI); 7 CFR § 15a.2 (Department of Agriculture; Title IX); 7 CFR § 15b.3 (Department of Agriculture; handicap discrimination); 10 CFR § 4.4 (Nuclear Regulatory Commission); 10 CFR § 1040.83 (Department of Energy; age discrimination); 14 CFR § 1250.102 (National Aeronautics and Space Administration; Title VI); 14 CFR § 1251.102 (NASA; handicap discrimination); 14 CFR § 1252.103 (NASA; age discrimination); 15 CFR § 8.3 (Department of Commerce; Title VI); 15 CFR § 20.3 (Department of Commerce; age discrimination); 18 CFR § 705.2 (Water Resources Council; Title VI); 22 CFR § 141.12 (Department of State; Title VI); 22 CFR § 142.3 (Department of State; handicap discrimination); 22 CFR § 209.3 (Agency for International Development; Title VI); 22 CFR § 217.3 (Agency for International Development; handicap discrimination); 24 CFR § 1.2 (Housing and Urban

In light of its broad implications, we respectfully request that the Court grant certiorari to resolve the conflict between the Court of Appeals decision and this Court's precedents.

Development; Title VI); 24 CFR § 146.7 (Housing and Urban Development; age discrimination); 28 CFR § 37.2 (Department of Justice; Americans with Disabilities Act and Section 504); 28 CFR § 41.3 (Department of Justice; Executive Order 12250); 28 CFR § 42.102 (Department of Justice; Title VI); 28 CFR § 42.540 (Department of Justice; Section 504); 28 CFR § 42.613 (Department of Justice); 28 CFR § 42.72 (Department of Justice, age discrimination); 29 CFR § 31.2 (Secretary of Labor; Title VI); 29 CFR § 32.3 (Secretary of Labor; handicap discrimination); 29 CFR § 1640.2 (EEOC; ADA and Section 504); 29 CFR § 1691.13 (EEOC); 32 CFR § 195.2 (Department of Defense; Title VI); 34 CFR § 100.13 (Department of Education; Title VI); 34 CFR Pt. 100, App. B (Department of Education); 34 CFR § 104.3 (Department of Education; handicap discrimination); 34 CFR § 106.2 (Department of Education; gender discrimination); 34 CFR § 110.3 (Department of Education; age discrmination); 38 CFR § 18.13 (Department of Veterans Affairs; Title VI); 38 CFR § 18.403 (same); 38 CFR § 18.503 (Department of Veterans Affairs; age discrmination); 40 CFR § 7.25 (Environmental Protection Agency); 41 CFR § 101-6.216 (General Services Administration); 41 CFR § 101-8.703 (Federal property management regulations; age discrimination); 43 CFR § 17.12 (Department of the Interior); 43 CFR § 17.202 (Department of the Interior; handicap discrimination); 43 CFR § 17.303 (Department of the Interior; age discrimination); 44 CFR § 7.2 (Federal Emergency Management Agency; general nondiscrimination); 44 CFR § 7.913 (FEMA; age discrimination); 45 CFR § 80.13 (Department of Health and Human Services; Title VI); 45 CFR Pt. 80, App. B (HHS; Title VI); 45 CFR § 84.3 (HHS; handicap discrimination); 45 CFR § 86.2 (HHS; sex discrimination); 45 CFR § 90.4 (HHS; age discrimination); 45 CFR § 91.4 (same); 45 CFR § 605.3 (National Science Foundation; age discriminaation); 45 CFR § 611.13 (National Science Foundation; Title VI); 45 CFR § 1110.13 (National Foundation on the Arts and the Humanities); 45 CFR § 1151.3 (National Endowment for the Arts; handicap discrimination); 45 CFR § 1156.3 (National Endowment for the Arts; age discrimination); 45 CFR § 1170.3 (National Endowment for the Arts; handicap discrimination); 45 CFR § 1203.3 (Corporation for National and Community Service; Title VI); 45 CFR § 1232.3 (Corporation for National and Community Service; age discrimination); 49 CFR § 21.23 (Department of Transportation; Title VI); 49 CFR § 23.5 (Department of Transportation; minority business enterprises); 49 CFR § 27.5 (Secretary of Transportation; disability discrimination).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A - Opinion of the Court of Appeals, filed September 14, 1998.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 97-9162

Marilyn J. BARTLETT, Plaintiff-Appellee,

v.

NEW YORK STATE BOARD OF LAW EXAMINERS, James T. Fuller, individually and as Executive Secretary, New York State Board of Law Examiners, John E. Holt-Harris, Jr., individually and as Chairman, New York State Board of Law Examiners, Richard J. Bartlett, individually and as member, New York State Board of Law Examiners, Laura Taylor Swain, individually and as member, New York State Board of Law Examiners, Charles T. Beeching, Jr., individually and as member, New York State Board of Law Examiners, and Ira P. Sloane, individually and as member, New York State Board of Law Examiners, Defendants-Appellants.

Argued June 2, 1998.
Decided Sept. 14, 1998.

Before: MESKILL and CABRANES, Circuit Judges, and NICKERSON,* District Judge.

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*Honorable Eugene H. Nickerson, United States District Judge for the Eastern District of New York, sitting by designation .

MESKILL, Circuit Judge:

This is an appeal from a July 14, 1997 judgment of the United States District Court for the Southern District of New York, Sotomayor, *J.*, after a 21 day bench trial, finding appellee, Dr. Marilyn Bartlett, disabled within the meaning of the Americans with Disabilities Act of 1990(ADA), 42 U.S.C. § 12101, *et seq.*, and the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 701, *et seq.*, and entering an injunction against the appellant, New York State Board of Law Examiners (Board) requiring it to provide Dr. Bartlett with reasonable accommodations in taking the New York State Bar Examination. The district court also awarded $12,500 in damages to compensate her for fees paid in connection with past attempts to pass that examination. *See Bartlett v. New York State Bd. of Law Examiners*, 970 F.Supp. 1094 (S.D.N.Y.1997). The district court granted qualified immunity to the individual defendants. That decision has not been appealed.

We affirm in part, vacate in part and remand for further proceedings. We agree, albeit for different reasons, with the district court's ultimate conclusion that Dr. Bartlett, who has fought an uphill battle with a reading disorder throughout her education, is among those for whom Congress provided protection under the ADA and the Rehabilitation Act. As a result, she is entitled to reasonable accommodations in sitting for the New York bar examination. The ADA and the Rehabilitation Act do not guarantee Dr. Bartlett examination conditions that will enable her to *pass* the bar examination--that she must achieve on her own. What Congress did provide for, and what the Board has previously denied her, is the opportunity to *take* the examination on a level playing field with other applicants.

Specifically, this appeal presents the legal issues of (1) whether the district court erred in refusing to defer to the Board's determination that Dr. Bartlett is not disabled; (2) whether the district court erred in concluding that Dr. Bartlett is disabled under the ADA and the Rehabilitation Act in her ability to work and thus entitled to accommodations in taking the New York State Bar Examination; (3) whether the district court erred in concluding that the Board is subject to the strictures of the Rehabilitation Act; and (4) whether the district court erred in awarding Dr. Bartlett compensatory damages in the amount of $12,500 from the Board for fees paid in connection with the five bar examinations that she failed.

We conclude that the district court properly declined to defer to the Board's determination regarding Dr. Bartlett's disability. We also conclude that because the record demonstrates that Dr. Bartlett suffers from a disability that substantially limits her major life activities of reading and learning, it was error for the district court to reach the issue of whether Dr. Bartlett is disabled in her ability to work. However, because Dr. Bartlett nevertheless does suffer a learning or reading impairment that rises to the level of a substantial limitation cognizable under the ADA and the Rehabilitation Act, we find no error in the district court's ultimate conclusion that Dr. Bartlett is entitled to reasonable accommodations in taking the New York State Bar Examination. We also agree with the district court that the Board is subject to the strictures of the Rehabilitation Act and that Dr. Bartlett is entitled to compensation for at least some of the fees paid in connection with past attempts to pass the New York State Bar Examination without accommodations. Because we disagree with the district court on the proper amount of compensatory damages, we vacate and remand on that narrow ground only.

BACKGROUND

At trial, the district court found the following relevant facts. Plaintiff-appellee Dr. Marilyn Bartlett is a 49 year old woman with a cognitive disorder that impairs her ability to read. Despite her limitation, she has earned a Ph.D. in Educational Administration from New York University, a law degree from Vermont Law School, and has met all prerequisites to sit for the New York State Bar Examination (the bar examination). The defendant-appellant Board is a State entity charged with testing and licensing applicants seeking admission to the New York State Bar.

Since 1991, Dr. Bartlett has taken the bar examination five times. On at least three and possibly four separate occasions, she has applied as a reading disabled candidate to take the bar examination with accommodations.[1] Dr. Bartlett has sought unlimited or extended time to take the test, permission to tape record her essays and to circle her multiple choice answers in the test booklet. The Board has denied her request each time, contending that her application does not support a diagnosis of a reading disability or dyslexia. In total, Dr. Bartlett has taken the examination four times without accommodations and has yet to pass. On July 20, 1993, after the Board denied her most recent application for accommodations, she commenced this action in the district court alleging, among other things, violations of Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, and § 504 of the Rehabilitation

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[1]She requested accommodations for the July 1991, February 1993 and July 1993 examinations. Dr. Bartlett did not seek accommodations for the February 1992 bar examination and the record is unclear as to whether she sought accommodations for the July 1992 exam. With respect to the July 1992 exam, the district court found that "[Dr. Bartlett] claims she [applied for accommodations], but the Board has no record of the request." *Bartlett*, 970 F.Supp. at 1102.

Act, 29 U.S.C. § 794. In her complaint, she sought, among other things, injunctive relief in the form of reasonable testing accommodations and compensatory damages for fees paid in connection with past attempts to pass the examination.

On July 26, 1993, the parties entered into a stipulation. Under its terms, Dr. Bartlett received accommodations during the July 1993 bar examination that included time-and-a-half for the New York portion of the test and the use of an amanuensis to read the test questions and to record her responses. In addition, the Board allowed Dr. Bartlett to mark the answers to the multiple choice portion of the examination in a question book rather than on a computerized answer sheet. However, the parties agreed that if Dr. Bartlett passed the examination, the results would not be certified unless she prevailed in this lawsuit. Despite accommodations, Dr. Bartlett failed the examination.

The Board has denied Dr. Bartlett's requested accommodations because its expert on learning disabilities, Dr. Frank Vellutino (Dr. Vellutino), does not believe that she has dyslexia or a reading disability. Dr. Vellutino's opinion is grounded primarily on Dr. Bartlett's performance on two subtests of the Woodcock Reading Mastery Test-Revised (the Woodcock), a battery of tests commonly employed to assess learning disabilities. Because Dr. Bartlett achieved scores above the 30th percentile on two subtests of that battery, Dr. Vellutino concluded that she did not have a reading disability.

The two subtests at issue are the Woodcock "Word Attack" and "Word Identification." These tests are designed to measure a subject's " '[w]ord identification and phonetic decoding or word analysis skills (ability to "sound out" a word).' " *Bartlett*, 970 F.Supp. at 1112. Specifically, the "Word Attack" subtest requires the subject to sound out 45

nonsense words of varying complexity. The "Word Identification" subtest, on the other hand, measures a subject's ability to identify 106 real words in isolation that range from a simple "is" to the more difficult "zymolysis." Both tests are untimed and the scores do not reflect incorrect tries that precede a correct answer. Because "the incidence of learning disabilit[ies] in the population is estimated at between 5% and 20%," *see id.*, Dr. Vellutino estimates that a 30% cutoff is reasonably certain to capture all disabled applicants. Accordingly, he recommended against providing accommodations to any applicant, including Dr. Bartlett, who performs above the 30th percentile.

At trial, Dr. Bartlett challenged Dr. Vellutino's opinion. She presented expert testimony and other evidence to the effect that her reading disability could not be measured solely by the Woodcock. On July 7, 1997, the court issued its opinion and order. After a thorough and painstaking discussion of Dr. Bartlett's evidence, the district court found fatal infirmities in Dr. Vellutino's reliance on the Woodcock and the Board's subsequent rejection of Dr. Bartlett's claim of disability. Specifically, the court found (a) the Woodcock could not measure Dr. Bartlett's lack of "automaticity," *i.e.*, her ability to recognize a printed word and read it accurately and immediately without thinking; (b) the Woodcock was not timed and thus could not measure the slowness of reading--an important characteristic of adult dyslexics like Dr. Bartlett, who, on other tests, had demonstrated a reading rate comparable to the bottom fourth percentile of college freshman when timed; (c) the Woodcock was designed principally to assess children and did not have enough items in the difficult range; and (d) Dr. Bartlett's Woodcock results exhibited discrepancies, revealing high reading comprehension scores in comparison to low, but average, Word Attack and Word Identification scores. *See id.* at 1114. Furthermore, the

district court found that Dr. Vellutino's use of a 30th percentile cutoff was arbitrary and flawed because other studies demonstrated that one third of adults with dyslexia scored above that percentile on similar tests. *See id.*

In sum, the district court agreed with Dr. Bartlett's experts that "a reading disability is not quantifiable merely in test scores.... [Rather] diagnosing a learning disability requires clinical judgment." *Id.* In this regard, the district court found that Dr. Bartlett's low "test scores on the Woodcock, combined with clinical observations of her [slow and halting] manner of reading amply support a conclusion that she has an automaticity and a reading rate problem." *Id; see also id.* at 1107. Moreover, the court agreed with Dr. Bartlett's experts that her "earlier work as a school teacher where phonics were stressed allowed [her] to develop 'self-accommodations' that account for her ability to spell better and to perform better on word identity and word attack tests than would be expected of a reading disabled person." *Id.* at 1109; *see also id.* at 1120.

The district court, however, did not find that Dr. Bartlett is substantially limited in the major life activities of reading or learning, reasoning that her "history of self-accommodation has allowed her to achieve ... roughly average reading skills (on some measures) when compared to the general population." *Id.* at 1120. Rather, the court, relying on regulations promulgated under Title I of the ADA, held that Dr. Bartlett is disabled in her ability to "work" because her reading rate compared unfavorably with "persons of 'comparable training, skills and abilities.' " *Id.* at 1121. Specifically, the court concluded that Dr. Bartlett's inability to compete on the bar examination constituted a work disability, stating:

> If plaintiff's disability prevents her from competing on a level playing field with other bar examination applicants, then her disability has implicated the major life activity of working because if she is not given a chance to compete fairly on what is essentially an employment test, she is necessarily precluded from potential employment in that field. In this sense, the bar examination clearly implicates the major life activity of working.

Id. The court then concluded, *inter alia,* that Dr. Bartlett is disabled within the meaning of the ADA and § 504 of the Rehabilitation Act, *id.* at 1126, and that the Board's failure to accommodate her constituted violations of those statutes.

As a remedy for the violations found, the court ordered injunctive relief in the form of reasonable testing accommodations including double time in taking the examination, the use of a computer, permission to circle multiple choice answers in the examination booklet, and large print on both the New York State and Multistate Bar Exam. *Id.* at 1153. The court also awarded compensatory damages in the amount of $12,500 for fees paid in connection with the five bar examinations that Dr. Bartlett failed. *Id.* at 1152.

On July 14, 1997, the Board moved for relief from the judgment, or in the alternative to amend it, pursuant to Fed.R.Civ.P. 59(e) and 60(b). By memorandum of decision dated August 15, 1997, the district court denied that motion. *See Bartlett v. New York State Bd. of Law Examiners,* 2 F.Supp.2d 388 (S.D.N.Y.1997). On September 10, 1997, the Board filed its notice of appeal.

DISCUSSION

On appeal, the Board claims that the district court (1) erred in refusing to defer to its determination that Dr. Bartlett is not disabled; (2) erred in concluding that Dr. Bartlett is disabled in her ability to work and thus entitled to accommodations in taking the bar examination; (3) erred in concluding that the Board is subject to the strictures of the Rehabilitation Act; and (4) erred in awarding compensatory damages in the amount of $12,500 for fees paid in connection with each of the five bar examinations that Dr. Bartlett failed.

After a bench trial, we review a district court's factual findings for clear error and its conclusions of law *de novo*. *See Ezekwo v. New York City Health & Hosps. Corp.*, 940 F.2d 775, 780 (2d Cir.1991). So-called mixed questions of law and fact are reviewed *de novo*. *Travellers Int'l, A.G. v. Trans World Airlines*, 41 F.3d 1570, 1575 (2d Cir.1994); *see also Muller v. Committee on Special Educ. of the East Islip Union Free School Dist.*, 145 F.3d 95, 102 (2d Cir.1998) (*de novo* review governed where statutory and regulatory definitions were applied to facts surrounding plaintiff's medical and educational history).

1. *Deference to the Board*

The Board first argues that the district court erred in refusing to accord "considerable judicial deference" to its factual finding that Dr. Bartlett is not disabled. Specifically, the Board asserts that our decision in *Doe v. New York Univ.*, 666 F.2d 761, 775-76 (2d Cir.1981), requires federal courts to defer to the findings of a state administrative agency when the agency's findings are supported by expert opinion. We disagree.

A federal court may, in its discretion, defer to the findings of a state administrative agency. *See Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1311 (9th Cir.1987) (quoting *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir.1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "There is no generally accepted rule to determine the degree of deference that [should be accorded] to the factual determinations of state and local administrative agencies." *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 648 (2d Cir.1979). When deference is due, however, it is not because of the factfinder's status as a state agency, but because of the factfinder's inherent expertise on "technical matters foreign to the experience of most courts." *Id.* at 650; *see also Youngberg v. Romeo*, 457 U.S. 307, 323, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (citing *Bell v. Wolfish*, 441 U.S. 520, 544, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and its observation that "[c]ourts should not second-guess the expert administrators on matters on which they are better informed.") (internal quotation marks omitted). Thus, in *Doe*, we deferred to the findings of an academic institution on issues relating to academic qualifications required for admission to an institution of higher education, because "[c]ourts are particularly ill-equipped to evaluate academic performance." *Id.* at 776 (citation and internal quotation marks omitted). We did not, as the Board would have it, announce a rule of law that deference should be accorded once a state agency's fact finding is supported by expert opinion regardless of the agency's particular expertise. Moreover, even where an agency has expertise, courts should not allow agency factual determinations to go unchallenged, *see Carey*, 612 F.2d at 648, and deference is particularly "inappropriate once that agency is the defendant in a discrimination suit." *Id.* at 649.

Applying these principles to the instant case, the district court properly refused to defer to the Board. The Board has no expertise in assessing learning disabilities. Rather, the Board's expertise is in defining the minimum qualifications necessary to practice law in New York. Accordingly, both reason and the law militate against giving deference to the Board's findings regarding disability, especially where, as here, the Board is defending against charges of illegal discrimination.

2. *Disability*

The central issue on appeal is whether Dr. Bartlett is disabled within the meaning of the ADA and the Rehabilitation Act and thus entitled to reasonable accommodations in taking the bar examination. We conclude that she is disabled, but for reasons other than those articulated by the district court.

An individual is disabled within the meaning of the ADA and § 504 of the Rehabilitation Act if, *inter alia,* that individual suffers "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A)(ADA); *see also* 29 U.S.C. § 706(8)(B) (Rehabilitation Act). "The ADA does not define [the] ... phrases above that are critical to understanding the nature of an ADA disability: 'physical or mental impairment,' ['major life activities' and 'substantially limits']." *See Price v. National Bd. of Medical Examiners,* 966 F.Supp. 419, 424 (S.D.W.Va.1997). However, Congress authorized the Equal Employment Opportunities Commission (EEOC) to issue regulations defining workplace discrimination under Title I of the ADA. *See* 42 U.S.C. § 12116. The Attorney General (Department of Justice), on the other hand, was authorized to issue regulations addressing discrimination in both public and private service organizations under Titles II

and III of the ADA. *See* 42 U.S.C. § 12134(a) (Title II, Subtitle A), and 42 U.S.C. § 12186(b) (Title III).[2]

Dr. Bartlett commenced this action under, *inter alia*, Title II of the ADA against the Board, a public licensing entity. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(6). She claimed to suffer a physical or mental impairment that substantially limited her major life activities of learning (or reading)[3] and working. Regulations promulgated by the Justice Department under Title II of the ADA define a "physical or mental impairment" as "[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and *specific learning disabilities*." 28 C.F.R. § 35.104 (at *Disability* (1)(i)(B)) (emphasis added). These same regulations define "major life activities" as "functions such as ... walking, seeing, hearing, speaking, breathing, *learning*, and *working*." 28 C.F.R. § 35.104 (at *Disability* (2)) (emphasis added). Title II regulations do not define the phrase "substantially limits." However, the Justice Department's Title II interpretive guidance states that "Title II ... incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing [the Rehabilitation Act]." *See* 28 C.F.R. § 35.103, App. A. We therefore turn to Titles I and III for the definition of "substantially limits."

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[2]Congress also authorized the Secretary of Transportation to issue regulations not relevant here. *See* 42 U.S.C. §§ 12149, 12164 and 12186(a).

[3]*See Bartlett*, 970 F.Supp. at 1117 ("The experts who testified at trial agreed that reading is the major life activity most commonly affected by learning disabilities.... Clearly, reading is a major life activity, as other courts have found.") (citing *Pridemore v. Rural Legal Aid Society*, 625 F.Supp. 1180, 1183-84 (S.D.Ohio 1985)).

Under Title I, "substantially limits" is defined as "[s]ignificantly restrict[s] as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the *average person in the general population* can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (emphasis added). This definition is consistent with the Justice Department's Title II and III interpretive guidance. *See* 28 C.F.R. §§ 35.104 App. A at 470, 36.104 App. B at 611 (measuring the restriction of major life activities "in comparison to most people"). However, for the specific major life activity of "working," Title I regulations define "substantially limits" as

> significantly restrict[s] ... the ability to perform either a class of jobs or a broad range of jobs in various classes as *compared to the average person having comparable training, skills and abilities.* The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
>
> 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added).

In its opinion and order, the district court concluded that Dr. Bartlett is not "substantially limited" in her major life activities of reading or learning, reasoning that her "history of self-accommodation has allowed her to achieve ... roughly average reading skills (on some measures) when *compared to the general population.*" *Bartlett,* 970 F.Supp. at 1120 (emphasis added). However, in the district court's view, the bar examination implicates the major life activity of working because "if [Dr. Bartlett] is not given a chance to compete fairly on what is essentially an employment test, she is necessarily precluded from potential employment in that

field." *Id.* at 1121. In turn, the Title I "working" rubric provides for a comparison with a more narrow reference group--the population having "comparable training, skills and abilities," 29 C.F.R. § 1630.2(j)(3)(i)--in determining whether a limitation is substantial. Invoking that standard, the district court concluded that Dr. Bartlett is disabled within the meaning of the ADA because her "reading ability" compared unfavorably with people of "[comparable] educational achievement," that is, with persons of "[comparable] background, skills, and abilities." *Id.* at 1126.

On appeal, the lion's share of the arguments center on whether the district court properly concluded that the bar examination implicates the major life activity of working, and whether it was appropriate for the district court to employ the Title I comparative standard for determining a working disability in this Title II case. Because we believe, however, that the district court erred in its threshold holding that Dr. Bartlett is not substantially limited in her major life activity of reading or learning as compared to the manner and condition under which the average person can read or learn, we do not reach the issue of whether Dr. Bartlett is disabled in her major life activity of working or the extent to which the Title I standard for assessing a working disability may apply. *See* 29 C.F.R. Pt. 1630, App. § 1630.2(j) ("If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.").

As we have discussed, the district court concluded that Dr. Bartlett was not substantially limited in reading or learning, and hence not disabled within the meaning of the ADA or § 504 of the Rehabilitation Act, because her "history of self-accommodation has allowed her to achieve ... roughly average reading skills (on some measures) when compared to

the general population." *Bartlett,* 970 F.Supp. at 1120. Dr. Bartlett, joined by the Justice Department as *amicus curiae,* claim error in this aspect of the court's reasoning. Specifically, both Dr. Bartlett and the Justice Department assert that a person's ability to self-accommodate does not foreclose a finding of disability. We agree.

"[A] disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." H.R.Rep. No. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334. In *Doane v. City of Omaha,* 115 F.3d 624 (8th Cir.1997), *cert. denied,* --- U.S. ----, 118 S.Ct. 693, 139 L.Ed.2d 638 (1998), the Eighth Circuit held that a police officer, blinded in one eye, was disabled within the meaning of the ADA notwithstanding his development of self-accommodations or "subconscious adjustments" enabling him to compensate for the limitation. *Id.* at 627. In this regard, the court stated: "[The plaintiff's] brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments to the impairment do not take him outside of the protective provisions of the ADA." *Id.* at 627-28; *see also Wilson v. Pennsylvania State Police Dep't,* 964 F.Supp. 898, 907 (E.D.Pa.1997) (concluding that plaintiff is entitled to proceed to trial based on disability despite use of glasses to correct vision); *cf. Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs,* 872 F.Supp. 682, 685 (W.D.Mo.1995) (concluding that self-accommodating plaintiff is disabled under Title II). In this case, Dr. Bartlett suffers from a lack of automaticity and a phonological processing defect that significantly restricts her ability to identify timely and decode the written word, that is, to read as compared to the manner and conditions under which the average person in the general population can read or learn. Her history of self-accommodations,

while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population, "do not take [her] outside of the protective provisions of the ADA," *Doane,* 115 F.3d at 627-28, especially where, as here, the dispositive measure is the Woodcock, a test that allowed her unlimited time to compensate for her disability, and a test that cannot measure automaticity directly. Hence, we agree that Dr. Bartlett is disabled within the meaning of Title II of the ADA and § 504 of the Rehabilitation Act and is entitled to reasonable accommodations in taking the bar examination.

3. *The Rehabilitation Act*

Although it is undisputed that the Board is subject to the ADA--an adequate independent ground for our finding of liability above--the Board contests the district court's conclusion that liability may also be premised on the Rehabilitation Act, because it contends that it is not an entity subject to that statute. The district court found that because the Board has "*elect[ed]* to accept [federal] money, ... the Board ... consented to ... the burdens of Section 504 [of the Rehabilitation Act]." *Bartlett,* 970 F.Supp. at 1118 (emphasis added). The Board argues that the district court's finding is clearly erroneous because (a) the record contains no evidence that the Board receives federal funds; (b) the Board has no authority to accept or decline federal funds received by other state agencies; and (c) the Board's operation costs are in no way subsidized by federal funds.

Dr. Bartlett responds that because the Board "receives" federal funds from two New York agencies, the Board is bound by the Rehabilitation Act. Specifically, the New York State Department of Education, Office of Vocational and Educational Services for Individuals with Disabilities (VESID) and the New York State Department of Social

Services, Commission for the Blind and Visually Handicapped (CBVH) receive federal funds and issue vouchers for handicapped bar applicants to pay for the bar examination. The individual bar applicants submit the vouchers to the Board which in turn submits them to the VESID and the CBVH for payment. Thus, Dr. Bartlett maintains that the Board is a recipient of federal funds within the meaning of § 504. We agree.

Section 504 of the Rehabilitation Act prohibits discrimination against persons with disabilities by "any *program or activity receiving* Federal financial assistance." 29 U.S.C. § 794(a). "Congress limited the scope of § 504 to those who actually 'receive' federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the *recipient's agreement* to accept the federal funds." *United States Dep't of Transp. v. Paralyzed Veterans,* 477 U.S. 597, 605, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986) (emphasis added). Thus, section 504 obligations may be imposed only on "those who are *in a position to accept or reject those obligations* as a part of the decision whether or not to 'receive' federal funds." *Paralyzed Veterans,* 477 U.S. at 606, 106 S.Ct. 2705 (emphasis added). There is neither a requirement that a state entity *directly* receive federal financial assistance, *see Grove City College v. Bell,* 465 U.S. 555, 564, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), nor that it directly benefit from that assistance, *see Paralyzed Veterans,* 477 U.S. at 607, 106 S.Ct. 2705 (citing *Grove City*).

Shortly after the Supreme Court's decisions in *Grove City* and *Paralyzed Veterans,* Congress amended the Rehabilitation Act to extend § 504 liability to departmental or agency affiliates and transferees. *See* Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, § 4, 102 Stat. 28, 29 (1988) (codified at 29 U.S.C. § 794) (1988 Amendments). Under the

1988 Amendments, the definition of "program or activity" was expanded to include not only a state or local entity originally receiving such assistance, but also each department or agency to which it "extend[s]" that assistance. 29 U.S.C. § 794(b)(1)(B) (emphasis added). Similarly, regulations promulgated under the Rehabilitation Act define a "recipient" as including "any instrumentality of a state ... to which Federal financial assistance is extended directly *or through another recipient.*" 45 C.F.R. § 84.3(f) (emphasis added). Neither the statute nor the regulations require an analysis of whether the instrumentality of a state to which the assistance is "extended," must also be in a position to accept or reject § 504 obligations for the strictures of the Rehabilitation Act to apply.

Therefore, although there is nothing in the record to indicate that the Board ever actually elected to accept federal funds, the lack of such evidence is immaterial. Likewise, it is not relevant whether the Board directly receives federal assistance or benefits from such assistance by way of subsidy. The Board is bound by the Rehabilitation Act simply because two state entities, VESID and the CBVH, elected to receive federal funds and then extended that assistance to the Board in the form of vouchers for handicapped bar applicants. Accordingly, the district court's conclusion that the Board is subject to § 504 is correct.

4. *Compensatory Damages*

a. *Compensatory Damages and the Rehabilitation Act*

The Board next argues that the district court erred in awarding Dr. Bartlett compensatory damages. Specifically, the Board asserts that while compensatory damages are available under the ADA and the Rehabilitation Act, Dr. Bartlett is not entitled to them because she failed to prove

intentional discrimination. In this regard, the Board argues that the district court conceded the lack of discriminatory intent by finding, in the context of its qualified immunity analysis, that the Board's denial of accommodations was "objectively reasonable" and that "[d]efendants seemingly made an attempt to comply with the statutes." *Bartlett,* 970 F.Supp. at 1146.

We conclude that Dr. Bartlett met her burden of proving discriminatory intent within the meaning of the ADA and the Rehabilitation Act. Accordingly, we find no error in the conclusion of the district court that she is entitled to compensatory damages. A plaintiff aggrieved by a violation of the ADA or the Rehabilitation Act may seek Title VI remedies. *See* 29 U.S.C. § 794a(a)(2); *see also* 42 U.S.C. § 12133 (ADA, looking to remedies provided under the Rehabilitation Act); *Bartlett,* 970 F.Supp. at 1147 n. 39. The law is well settled that intentional violations of Title VI, and thus the ADA and the Rehabilitation Act, can call for an award of money damages. *See Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 74, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (in the context of Title IX cases, compensatory damages are available for an intentional violation); *Pandazides v. Virginia Bd. of Education,* 13 F.3d 823, 830 (4th Cir.1994) (because of the similarity between Title IX and § 504 of the Rehabilitation Act, compensatory damages are available for intentional discrimination); *Moreno v. Consolidated Rail Corp.,* 99 F.3d 782, 789 (6th Cir.1996) ("Every circuit that has reached the issue after *Franklin* has held that compensatory damages are available under [the Rehabilitation Act].").

In the context of the Rehabilitation Act, intentional discrimination against the disabled does not require personal animosity or ill will. *See Tyler v. City of Manhattan,* 118 F.3d

1400, 1406 (10th Cir.1997) (citing *Oxford House-C v. City of St. Louis*, 843 F.Supp. 1556, 1577 (E.D.Mo.1994)). Rather, intentional discrimination may be inferred when a "policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy ... [or] custom." *Ferguson v. City of Phoenix*, 931 F.Supp. 688, 697 (D.Ariz.1996), (internal quotation marks and citations omitted) (first alteration in original); *see also Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

In this case, the Board implemented a policy of denying accommodations to any learning disabled bar applicant who achieved scores above the 30th percentile on the Woodcock Word Attack and Word Identification tests. As the evidence showed at trial, however, one third of adults *with dyslexia* scored above that percentile on similar tests. Moreover, the Woodcock, unlike the bar examination, is untimed. Consequently, the Woodcock is unreliable in measuring a disability commonly manifested in part by a deficient reading rate. Nevertheless, based on that measure, the Board repeatedly denied Dr. Bartlett's requests for accommodations. We conclude that implementing such a policy constituted deliberate indifference to a strong likelihood of violating Dr. Bartlett's federally protected rights. Consequently, we conclude that Dr. Bartlett has met her burden of demonstrating entitlement to compensatory damages.

b. *The $12,500 Award*

The Board next argues that the district court erred in concluding that Dr. Bartlett is entitled to $12,500 in compensatory damages, representing $2,500 in fees paid for

each of five bar examinations she took without accommodations she requested. Specifically, the Board argues the sum is erroneous because Dr. Bartlett (a) did not timely apply for accommodations in taking the June 1991 bar examination; (b) did not seek accommodations for the February 1992 bar examination; (c) submitted no evidence in support of her contention that she sought accommodations for the July 1992 bar examination; and (d) received accommodations on the July 1993 bar examination but nevertheless failed. We agree in part.

We review the method of calculation of damages *de novo*, *see Wolff & Munier v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir.1991), and the actual calculation of damages for clear error, *see United States Naval Inst. v. Charter Communications*, 936 F.2d 692, 697-98 (2d Cir.1991). In holding the Board liable for Dr. Bartlett's bar examination expenses, the district court stated: "What is clear is that [Dr. Bartlett's] taking of the bar examination without the accommodations to which she was entitled under the law was a waste of her time and money. For the losses, [Dr. Bartlett] should be reimbursed." *Bartlett*, 970 F.Supp. at 1152. The court then awarded Dr. Bartlett compensatory damages for each of the five bar examinations she took. The court did not examine whether, for each bar examination, there was a denial of accommodations due to illegal discrimination. This was error as a matter of law. *See Atkins v. New York City*, 143 F.3d 100, 103 (2d Cir.1998) ("To recover compensatory damages plaintiff must prove that his injuries were proximately caused by [illegal discrimination.]"). We therefore conclude that the Board must compensate Dr. Bartlett only for bar examination expenses incurred where the Board denied accommodations because of illegal discrimination. Thus, because Dr. Bartlett did not seek accommodations for the February 1992 bar examination, the Board is not liable for

damages arising from its failure to accommodate. By contrast, the Board illegally denied Dr. Bartlett's timely request for accommodations in taking the February 1993 bar examination and, therefore, is liable for Dr. Bartlett's expenses incurred in connection with that examination. We cannot reach a conclusion on the award for the remaining three bar examinations because of the inadequacy of the district court's findings. Accordingly, we remand for findings of fact and a new damages calculation.

CONCLUSION

For reasons other than those articulated by the district court, we affirm the judgment that Dr. Bartlett is disabled within the meaning of the Americans with Disabilities Act and the Rehabilitation Act and thus was and is entitled to reasonable accommodations in taking the New York Bar Examination. Dr. Bartlett's cognitive impairment--her difficulties in automatically decoding and processing the printed word--limits her major life activities of learning and reading to a substantial degree. Reasonable accommodation of this disability will enable her to compete fairly with others in taking the examination, so that it will be her mastery of the legal skills and knowledge that the exam is designed to test--and not her disability--that determines whether or not she achieves a passing score. We vacate and remand for findings of fact and recalculation of compensatory damages due Dr. Bartlett in accordance with this decision.

Costs to the appellee.

Appendix B - Opinion and Order of the District Court, filed July 3, 1997.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 93 Civ. 4986(SS)
July 3, 1997.

Marilyn J. BARTLETT, Plaintiff,

v.

NEW YORK STATE BOARD OF LAW EXAMINERS; James T. Fuller, Individually and as Executive Secretary, New York State Board of Law Examiners; John E. Holt-Harris, Jr., Individually and as Chairman, New York State Board of Law Examiners; Richard J. Bartlett, Individually and as Member, New York State Board of Law Examiners, Laura Taylor Swain, Individually and as Member, New York State Board of Law Examiners, Charles T. Beeching, Jr., Individually and as Member, New York State Board of Law Examiners and Ira P. Sloane, Individually and as Member, New York State Board of Law Examiners, Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

OPINION

SOTOMAYOR, District Judge.

INTRODUCTION

This case, tried to the bench in 21 days of testimony accompanied by exhibits and briefs aggregating to more than 5000 pages, principally devolves to the meaning of a single wordi--*substantially*--as used in the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101-12213 (1995) and the Rehabilitation Act, 29 U.S.C. §§ 701-796 (1985) ("Section 504" or the "Rehabilitation Act"). Both Acts define a disability as "a physical or mental impairment that *substantially* limits one or more of" an individual's "major life activities." 42 U.S.C. § 12102(2)(A) (1995 Supp.); 29 U.S.C. § 706(8)(B) (1996 Supp.) (emphasis added).

Plaintiff claims she suffers from a learning disability that impairs her reading and her ability to be able to work as a lawyer. At issue in this case is whether plaintiff suffers from an impairment, and if so, whether it rises to the level of a substantial limitation cognizable under the ADA, thus entitling her to accommodations in taking New York State's Bar Examination. She sues for injunctive and other relief under Titles II and III of the ADA, Section 504 of the Rehabilitation Act, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and 42 U.S.C. § 1983.

The evidence at trial has convinced me that Marilyn Bartlett suffers from a learning deficit that evinces itself as a difficulty in reading with the speed, fluency and automaticity of an individual with her background and level of intellectual ability. Despite this impairment, plaintiff obtained a Ph.D. in Educational Administration and a law degree. By virtue of superior effort and not a small amount of courage, Marilyn Bartlett has been able to succeed academically and professionally despite the limitations her impairment has placed upon her.

But this case asks whether, in light of the confined language of the law, plaintiff is not merely impaired, but disabled.

The term "substantially limited" is defined in 29 C.F.R. § 1630.2(j)(1)(ii) as:

> (ii) Significantly restricted as to the *condition, manner or duration under* which an individual can perform a particular major life activity as compared to the *condition, manner, or duration* under which the average person in the general population can perform that same major life activity.

(emphasis added).[1] Similarly, with respect to the major life activity of working, "substantially limited" is defined by 29 C.F.R. § 1630.2(j)(3)(i) to mean "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the *average person having comparable training, skills and abilities"* (emphasis added). Regulations such as the foregoing must be accorded substantial deference because they reflect and incorporate active Congressional intervention in their fashioning. *See School Bd. of Nassau County v. Arline,* 480 U.S. 273, 279, 107 S.Ct. 1123, 1126-27, 94 L.Ed.2d 307 (1987) (citing *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 634-35, 104 S.Ct. 1248, 1254-55, 79 L.Ed.2d 568, & nn. 14-16 (1984)) (construing regulations adopted pursuant to the Rehabilitation Act).

For those of us for whom words sing, sentences paint pictures, and paragraphs create panoramic views of the world, the inability to identify and process words with ease would be

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[1]There are no significant textual or jurisprudential distinctions in the definition of disability, the burdens of proof or remedies between the ADA and Section 504. Accordingly, the definitions under both Acts are interchangeable for purposes of this case.

crippling. Plaintiff, an obviously intelligent, highly articulate individual reads slowly, haltingly, and laboriously. She simply does not read in the manner of an average person. I reject the basic premise of defendants' experts that a learning disability in reading can be identified solely by a person's inability to decode, *i.e.*, identify words, as measured by standardized tests, and I accept instead the basic premise of plaintiff's experts that a learning disability in reading has to be identified in the context of an individual's total processing difficulties.

Having witnessed all of the trial testimony and having studied the thousands of pages of exhibits, affidavits and depositions, I conclude that plaintiff is not able to read in the same condition, manner or duration as an average reader when measured against "the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). For this reason, I find that plaintiff is substantially impaired under the law, and she is therefore entitled to receive reasonable accommodations in taking the New York State Bar Examination.

For the reasons to be discussed, I deny plaintiffs equal protection, due process, and § 1983 claims.

I award her injunctive relief, and compensatory, but not punitive, damages.

BACKGROUND

I. UNDISPUTED FACTS

The following consists substantially of undisputed facts taken from the joint pretrial order submitted by the parties. The Court has added, where indicated, some additional facts to this section in order to clarify or complete the presentation set forth in the undisputed facts agreed to by the parties.

A. *Parties*

Plaintiff is a law school graduate who has met all the qualifications necessary to take the New York State Bar Examination. Defendants John Holt-Harris, Jr., Richard J. Bartlett, Laura Taylor Swain, Charles T. Beeching, Jr., Ira P. Sloane, and James T. Fuller, as Executive Secretary, are the members of the New York State Board of Law Examiners (the "Board"), and as such are responsible for the administration of the New York State Bar Examination.

B. *The Bar Examination*

The Board is authorized to conduct a written bar examination, twice a year, consisting of legal problems in both "adjective and substantive law." (N.Y.Comp.Codes R. & Regs. tit. 22, § 520.7 ("22 NYCRR")).

The Bar Examination is given over two days and tests the candidates' knowledge of legal principles and concepts that are relevant and important to the practice of law. The Board's mandate is to test for minimal competence to practice law. One day is devoted to answering the New York portion of the test, created by the Board and consisting of 50 multiple-choice questions and six essay questions. Unless an accommodation of extra time is granted for a disability, the New York portion of the test must be completed within six hours: a three-hour session in the morning and a three-hour session in the afternoon. The second day, which may be taken in another state, is devoted to the 200 multiple-choice questions of the Multistate Bar Examination ("MBE"), created by the National Conference of Bar Examiners. The MBE normally takes six and one-half hours. If the candidate elects to take the MBE in New York, it is administered by the Board as part of the New York State Bar Examination. A combined score of 660 on the MBE and the New York portion of the test is needed to pass the Bar Examina-

tion. According to trial testimony, spelling errors in responding to questions are not penalized on the Bar Examination. The Court accepts plaintiff's contention, however, that difficulties in spelling affects the clarity of the presentation and detracts from the expression of concepts.

Title 22 NYCRR § 220.13 authorizes the Board to adopt, amend or rescind rules it deems necessary and proper to enable it to discharge its duties. Title 22 NYCRR § 6000.4(a) permits applicants to apply for accommodations for the Bar Examination based upon a disability. It is the policy of the Board to provide accommodations in testing conditions to candidates with disabilities to the extent such accommodations are reasonable, consistent with the nature and purpose of the examination, and necessitated by the candidate's disability.

The Board has provided, *inter alia*, the following accommodations to applicants with disabilities: granted access to food and drink, provided a private room in which to take the examination and large print examinations, permitted up to double the amount of time over two days to take the examination, and approved use of a computer or amanuensis to record answers. If the MBE is taken in New York by a candidate to whom the Board has granted accommodations, the same accommodations apply to the MBE portion of the test.

To request accommodations, an applicant completes a form enclosed with the application and returns it with supporting documentation to the Board. *See* 22 NYCRR § 6000.4(b). The supporting documentation must state the nature of the candidate's disability, the requested accommodation, the causal relationship between the disability and the applicant's ability to take the Bar Examination without the requested accommodations, and the reason the specific accommodation requested by the candidate is required. *See* 22 NYCRR § 6000.4(c).

The Board's rules also require applicants to provide documentation of the three most recent testing accommodations, if any, granted to the candidate by academic institutions, licensure authorities, or other test administrators. *See* 22 NYCRR § 6000.4(c).

The Board has the discretion to require applicants to provide additional information relating to the disability and/or prior accommodations, and may also request that applicants submit to an examination by an expert designated by the Board in connection with an applicant's request for testing accommodations. *See* 22 NYCRR § 6000.4(d).

If a requested accommodation is denied, either in whole or in part, the Board's notification must state the reason for the denial. The candidate may appeal the decision to the Board. *See* 22 NYCRR § 6000.4(e). The Board must notify the applicant of its determination no later than twenty days prior to the date of the examination for which the accommodations are requested.

Title 22 NYCRR § 6000.4(f) defines the term "disability" as a "physical, neurological or learning disability" and the term "candidates with disabilities" as an "otherwise qualified candidate having such disabilities."

The Board in its discretion may delegate to its members, its Executive Secretary or Deputy Executive Secretary, all or any part of its duties and responsibilities in granting or denying accommodations, with the exception of the responsibilities relating to appeals. *See* 22 NYCRR § 6000.4(g).

C. *Plaintiff's Educational Background*

In 1970, plaintiff received a B.S.Ed. in Early Childhood Teacher Education from the State College at Worcester, Massachusetts. She graduated with a grade point average of

2.10. Plaintiff did not receive accommodations while at State College.

Plaintiff thereafter took the Graduate Record Examination without accommodations.

In 1976, plaintiff received a M.Ed. in Special Education, Educational Disturbances in Children, from Boston University. She graduated with a grade point average of 3.8. Plaintiff did not receive accommodations while at Boston University.

In the Fall of 1976, plaintiff entered the Ph.D. program in Educational Administration at New York University. Plaintiff first requested and received accommodations for the 1977 Summer semester. Plaintiff had not been formally diagnosed with a learning disability prior to receiving these accommodations. The Court accepts the plaintiff's and Dr. Evan's testimony that then-Ph.D. Program Director, Seymour Evans, who had knowledge of and experience with learning disabilities, recommended plaintiff for accommodations after he had worked with her and noted her reading difficulties.

New York University did not request, and plaintiff did not submit, any documentation of a learning disability in support of her request for accommodations. The accommodations granted to plaintiff at New York University included unlimited time to complete final examinations, unlimited time to take the written comprehensive examinations, use of an electronic typewriter with correction capability to take examinations, and the use of a department secretary as an amanuensis. Plaintiff was not granted accommodations for her examinations in statistics and administration, courses taught in another department. Plaintiff fulfilled her Ph.D. foreign language requirement by reading a passage in German and answering questions on the passage for the head of the German department. Plaintiff received her Ph.D. in 1981.

Plaintiff did not request accommodations for the Law School Aptitude Test, and she scored 32 out of a possible 48.

Plaintiff entered Vermont Law School in 1988. Plaintiff did not request accommodations during her first year of law school. Plaintiff's grade point average during that first year was 2.09, with a class ranking of 155 out of 166 students.

Plaintiff first requested and received accommodations during law school for the Fall 1989 examination period. Plaintiff received accommodations for the Spring 1990, Fall 1990 and Spring 1991 examination periods as well. The law school accommodations included time-and-a-half to take examinations, the use of a yellow legal pad with a red left margin instead of the traditional "blue book," and permission to circle the answers on multiple choice examinations instead of filling in a computer-scored answer sheet. Plaintiff's grade point averages after receipt of the accommodations were: Fall 1989--2.58; Spring 1990--2.50; Fall 1990--1.82[2]; Spring 1991--2.90.

Plaintiff graduated from Vermont Law School in May 1991, with a cumulative grade point average of 2.32, and a class standing of 143 out of 153 students.

D. *Plaintiff's Relevant Employment History*[3]

Except for periods during which she was preparing for the bar examinations or moving from one job to another, plaintiff has been continuously employed since graduating from law school. Upon graduating from law school, plaintiff worked at a New

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[2]At trial, plaintiff explained that during this semester she had spent a great deal of time traveling to, and caring for, an ill parent.

[3]The Court adds this section as its own finding of facts from testimony adduced at trial.

York law firm until December 1992, when her firm dismissed her because she failed the Bar Examination for the third time. In January of 1993 and until June of 1993, she worked with a client of her former law firm on a special project until its completion. After a number of months of unemployment during which time she could not find work in the legal profession, in September of 1993, plaintiff became a director of a day care center in Brooklyn, New York. In July of 1994, plaintiff returned to her former profession of educational administration, and is currently employed as an Associate Professor of Educational Administration at Dowling College. She receives accommodations at work for her reading problems in the form of a full-time work-study student who assists her in reading and writing tasks. While working at the law firm, plaintiff predominantly self-accommodated her disability (*e.g.*, dictating instead of writing reports, not billing for the additional time it took her to complete tasks), although she was given a computer before other associates because of her writing difficulties.

E. *Plaintiff's Bar Exam Applications*

Plaintiff took the Multistate Professional Responsibility Examination ("MPRE") in 1991 and received accommodations, including extra time, for that examination. The MPRE is not administered by the Board. In June 1991, fewer than 45 days before the examination, plaintiff applied, and requested accommodations, for the July 1991 Bar Examination.

Submitted with plaintiff's application was a Psychoeducational Evaluation from Philip M. Massad, Ph.D., a clinical psychologist, which indicated that he evaluated plaintiff on November 30, 1989 and December 7, 1989. In his evaluation, Dr. Massad concluded that plaintiff has "dyslexia characterized by a deficit in phonological processing (DSM-III-R 315.00)." (Pl.'s Ex. 20a, at 5, Massad's Psychoeducational Evaluation.)

On July 1, 1991, James Fuller, the Executive Secretary to the Board, advised plaintiff that because she had missed the deadline for applying for accommodations, her request was denied. Fuller further indicated that the Board did not consider the materials she had submitted as current, and that the scores she earned in 1989 on the Woodcock test--the test utilized by the Board to screen reading disabled applicants--did not qualify plaintiff for accommodations. Fuller based his conclusion on the fact that the Woodcock Word Attack and Word Identification scores on plaintiff's test were above the 30th percentile. Dr. Frank R. Vellutino, a research psychologist retained by the Board to advise it on policies relating to learning disabled applicants, had previously indicated to the Board and Fuller that scores above the 30th percentile generally did not identify an applicant as having a significant reading disability. (Fuller Aff. p 52.)[4] Vellutino, however, did not review plaintiff's application at this time.

Plaintiff failed the July 1991 Bar Examination with a score of 563 (a passing score is 660).

In November 1991, plaintiff applied for the February 1992 New York State Bar Examination. Plaintiff did not request accommodations for this test. Plaintiff took and failed the February 1992 Bar Examination with a score of 580.

In June 1992, plaintiff applied for the July 1992 Bar Examination. The parties dispute whether plaintiff applied for accommodations for this test. Plaintiff claims she did, but the Board has no record of the request. Plaintiff was not accommodated for the test, which she took and failed with a score of 576.

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[4]Witnesses gave their direct testimony at trial by way of an affidavit. "Aff." refers to the affidavit of direct testimony of the named individual.

In January 1993, plaintiff applied for the February 1993 Bar Examination, again requesting accommodations for her learning disabilities. The accommodations sought by plaintiff were unlimited/extended time to take the test, and permission to tape record her essays and to circle her multiple choice answers in the test booklet.

Submitted with plaintiff's request for accommodations was Dr. Massad's 1989 Psychoeducational Evaluation, previously submitted by plaintiff, and a November 20, 1992 letter from Dr. Massad to plaintiff reasserting the opinion he set forth in his 1989 Evaluation.

Upon receipt of this application, Fuller referred the file to Dr. Vellutino. After evaluating the materials submitted to him, Dr. Vellutino recommended that plaintiff's request for accommodations be denied. Based on Dr. Massad's 1989 evaluation and his 1992 letter, Dr. Vellutino concluded that there was "no compelling documentation" of a learning disability and that the reading test data did not support a diagnosis of dyslexia.

By letter dated January 20, 1993, Fuller forwarded the documentation relating to plaintiff and Dr. Vellutino's recommendation to the Board. The Board denied plaintiff's request for accommodations. In a letter dated January 26, 1993, Fuller advised plaintiff that the documentation she had submitted was insufficient to establish a basis for granting the accommodations requested.

Plaintiff appealed the Board's decision denying her accommodations in a letter received by the Board on February 17, 1993. Plaintiff did not submit any additional documentation concerning her learning disability with the appeal. By letter dated February 18, 1993, Fuller advised plaintiff that her appeal was untimely. Fuller also advised plaintiff that following consultation with an expert in the field, the Board had determined that

the documentation that plaintiff had provided did not support the finding of a disability warranting accommodations.

Plaintiff took and failed the February 1993 Bar Examination with a score of 615.

In May 1993, plaintiff applied for the July 1993 Bar Examination, again requesting accommodations. On plaintiff's application, plaintiff identified her disability as "learning disabilities--DSM III-R 315.00." Plaintiff obtained a new evaluation from a clinical psychologist, Dr. Richard F. Heath. Plaintiff requested the following accommodations: extra time, use of a word processor or permission to dictate essay responses, and leave to circle answers on the multiple choice questions examination sheet. Fuller referred this application to Dr. Vellutino.

Dr. Vellutino again recommended that plaintiff's request for accommodations be denied, affirming his original opinion that plaintiff did not have a reading disability. By letter dated June 29, 1993, the Board advised plaintiff that the test profiles she had provided did not support a diagnosis of dyslexia, and therefore, her request for accommodations was denied.

By letter dated July 12, 1993 from Jo Anne Simon, Esq. to Fuller, plaintiff submitted her application for reconsideration. Plaintiff included the following with her appeal: an affidavit by Stephanie J. Wilbanks, Associate Dean for Academic Affairs at Vermont Law School, attesting to the fact that plaintiff was provided accommodations during her final two years at law school; Dr. Massad's and Dr. Heath's Evaluations; a copy of a letter from Paul A. Cullinan, Ph.D., Chair of the Educational Administration Department at New York University, stating that plaintiff had received accommodations at New York University; and a notice from the Pennsylvania Bar Examiners advising plaintiff that she had been granted accommodations for the July 1993 Pennsylvania Bar Examination. Dr. Heath also submitted

a letter to the Board, dated July 3, 1993, wherein he reaffirmed his earlier evaluation and recommendation for accommodations.

Dr. Vellutino reviewed the file and again concluded that plaintiff's scores as reported by Dr. Massad and Dr. Heath supported his earlier opinion that there was insufficient documentation to support a finding of a learning disability. Fuller so notified plaintiff on July 19, 1993.

This litigation was commenced on July 20, 1993.

Pursuant to a Stipulation dated July 26, 1993 and so ordered by this Court, the parties agreed that plaintiff would receive accommodations during the July Bar Examination pending the outcome of this litigation. The Board gave plaintiff time-and-a-half--a period of nine hours--for the New York portion of the test and the use of an amanuensis to read the test questions to plaintiff and record her responses. In addition, the Board allowed plaintiff to mark the answers to the multiple choice portion of the examination in the question book rather than on the computerized answer sheet. Plaintiff elected to take the MBE in Pennsylvania.

Pursuant to the terms of the Stipulation, if plaintiff passed the July 1993 New York State Bar Examination with accommodations, the results were not to be certified to the Court of Appeals unless she was successful in this litigation.

Despite accommodation, plaintiff failed the July 1993 Bar Examination with a score of 597. At trial, plaintiff claimed the accommodations granted to her for this test were inadequate because she had had insufficient time to rest between the New York and Pennsylvania Bar Examinations or to practice with her amanuensis, an accommodation she had never previously used. She also complained that the proctor placed in her room caused distracting noises during the test.

F. *Other Bar Examinations*

In July 1993, plaintiff took the Pennsylvania Bar Examination and MBE with accommodations. The Pennsylvania Bar Examiners allowed plaintiff to mark her answers directly in the question booklet, gave her a separate room to take the test, granted her time-and-a-half--the maximum allowable time--and authorized her to use an amanuensis.

Plaintiff did not pass the Pennsylvania Bar Examination despite the accommodations.

G. *Overview of the Applications Submitted to the Board for Accommodations*

In February 1992, the Board administered the Bar Examination to 2,231 applicants. Among the applicants, 71 requested accommodations; 65 were granted, 4 were denied and 2 requested accommodations but either did not apply for the February 1992 Bar Examination or withdrew. Of the 71 applicants, 13 requested accommodations on the basis of a learning disability; 10 requests were granted and 3 were denied.

In July 1992, the Board administered the Bar Examination to 7,436 applicants. Of the applicants, 152 requested accommodations; 127 were granted, 7 were denied, 10 did not apply for the July 1992 Bar Examination or withdrew, one applicant passed the previous Bar Examination on appeal, 6 applicants did not provide additional documentation requested, and one applicant changed location due to a medical reason. Of the 152 applicants, 26 requested accommodations on the basis of a learning disability or attention deficit disorder; 21 requests were granted and 5 were denied.

In February 1993, the Board administered the Bar Examination to 2,202 applicants. Among the applicants, 102 requested accommodations; 88 were granted, 8 were denied, 1 did not qualify, 4 did not apply for the February 1993 Bar Examination or withdrew, and one applicant passed the previous Bar Examination on appeal. Of the 102 applicants, 19 requested accommodations on the basis of a learning disability or attention deficit disorder; 16 requests were granted and 3 were denied.

In July 1993, the Board administered the Bar Examination to 7,373 applicants. Of the applicants, 181 requested accommodations; 155 requests were granted, 16 were denied and 10 applicants did not respond to a request for additional information. Of the 181 applicants, 51 requested accommodations of the basis of a learning disability or attention deficit disorder; 37 requests were granted and 14 were denied.

II. ADDITIONAL FACTS

Based on the testimony presented and the exhibits admitted during the bench trial, my additional factual findings pursuant to Fed.R.Civ.P. 52 are as follows:

A. *Plaintiff's Psychoeducational Evaluations*

The evaluations of plaintiff by her three psychologists, all of whom testified at trial, can be summarized as follows.

1. PHILLIP M. MASSAD, Ph.D. (Examination in December 1989)

a) test results

Wechsler Adult Intelligence Scale--Revised ("WAIS")

Verbal IQ:	126
Performance IQ:	109

Full Scale IQ: 122

Mean = 100, Standard Deviation = 15

Verbal Scale		Performance Scale	
Information	15	Picture Completion	15
Digit Span	10	Picture Arrangement	11
Similarities	16	Block Design	11
Arithmetic	11	Object Assembly	10
Vocabulary	15	Digit Symbol	10
Comprehension	16		

Mean = 10, Standard Deviation = 3

Woodcock Reading Mastery Test--Revised, Form H

Subtest	Percentile Rank (by age)
Word Attack	67th
Word Identification	52nd
Word Comprehension	98th
Passage Comprehension	97th
Overall Reading Cluster	90th
Reading Comp. Cluster	97th
Basic Skills Cluster	64h

Wide Range Achievement Test--Revised ("WRAT")

Subtest	Percentile Rank (by age)
Spelling	34th
Arithmetic	63rd

Rey Osterreith Complex Figures Test

Subtest	Percentile Rank (by age)
Immediate Recall	35th
Delayed Recall	65th

b) clinical observations

Dr. Massad administered four tests for which he reported no scores: the Detroit Tests of Learning Aptitude, a test of visual memory with which he reported plaintiff "had difficulty"; the Bender Gestalt Visual Motor Test about which he made no comment; the Minnesota Multiphasic Personality Inventory from which he found no evidence of undue test anxiety or other psychopathology; and the Gray Test of Oral Reading--Revised (the "Gray"). (Dr. Massad's Psychoeducational Evaluation is at Pl.'s Ex. 20a.) Of particular significance is the Gray, because it is a test on which the subject reads aloud from a passage and reading speed is measured. It is untimed, meaning the test taker is under no time constraints to complete the reading assignment. Questions are then asked to assess reading comprehension. Dr. Massad testified that he had plaintiff read aloud from the test passage to "get a feel" for plaintiff's reading rate. (Tr. at 222.)[5] He did not score the result, and made no mention of it in his six-page Psychoeducational Evaluation because it is not normal for adults and because he did not remember that its findings were "significant or germane to the diagnoses or what I was trying to determine." (*Id.*) "I didn't see anything remarkable to report." (Tr. at 224.) Dr. Massad administered no other test that evaluated plaintiff's reading speed, nor did he draw any conclusions

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[5]As noted at the outset of this opinion, the trial transcript and exhibits are voluminous. Many of the witnesses at trial repeated themselves at various times. The Court is only citing, as deemed appropriate, to one place in the record where an issue is discussed. Citations to the trial transcript are made with the designation "Tr." followed by the relevant page number(s).

with regard to whether plaintiff was a slow reader. (Tr. at 206, 208.)

Based on his examination, Dr. Massad testified at trial that "it is my professional opinion that the plaintiff has learning disabilities characterized by difficulties with automaticity, phonological processing, organizing and processing visual-spacial information, short term memory and sequential processing and will require accommodations on the New York State Bar Examination." (Massad Aff. p 79.) Dr. Massad, however, did not discuss plaintiff's automaticity problems in the evaluation he submitted to the Board. (Tr. at 233.) He defines automaticity as the "ability to not have to deliberate when decoding a word." (*Id.*).

Dr. Massad agrees with the definition of learning disabilities contained in the Diagnostic and Statistical Manual III-R.[6] Based

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[6]The DSM-III-R definition reads, in pertinent part:

> Developmental Reading Disorder. The essential feature of this disorder is marked impairment in the development of word recognition skills and reading comprehension that is not explainable by mental retardation or inadequate schooling and that is not due to visual or hearing defect or a neurologic disorder. The diagnosis is made only if this impairment significantly interferes with academic achievement or with the activities of daily living that require reading skills. Oral reading is characterized by omissions, distortions, and substitutions of words and by slow, halting reading. Reading comprehension is also affected. This disorder has been referred to as "dyslexia."

(Pl.'s Ex. 99.)

The definition was revised in the latest version of the manual, the DSM-IV:

> The essential feature of reading disorder is reading achievement (i.e. reading accuracy, speed or comprehension as measured by individually administered tests) that falls substantially below that expected given the

on this definition, Dr. Massad believes that learning disabilities are characterized and identified by "intraindividual" variability in test performance scores. (Massad Aff. p 42.) He views plaintiff's disabilities as reflected in the variability exhibited by plaintiff's subtest scores on the Passage and Reading Comprehension WAIS subtests as compared to her Word Attack and Word Identification scores, and as between her verbal IQ and her spelling score on the WRAT. He further finds that plaintiff "had difficulty organizing and processing visual-spatial information" as evidenced by her score on the Block Design and Object Assembly subtests, and her Rey-Osterreith score. Dr. Massad also concludes that plaintiff's reading skills were below what would be expected of a subject with plaintiff's record of academic achievement and intelligence. (Massad Aff. p 81.)

2. RICHARD F. HEATH, Ph.D. (Examination in May 1993)

a) test results
Woodcock Reading Mastery Test--Revised (The "Woodcock")

	Form G %ile (age)	Form H % ile (age)	G & H % ile (age)	G & H % ile (grade) *
Visual Auditory Learning	46			
Letter Identification	18			

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individual's chronological age, measured intelligence and age-appropriate education.

(Pl.'s Ex. aa.)

Word Identification	37	52	45	35
Word Attack	28	50	37	26
Word Comprehension	76	90	84	73
Passage Comprehension	74	99	88	90
Readiness Cluster	28			
Basic Skills Cluster	36	53	43	25
Reading Comp. Cluster	78	98	89	85
Total Reading Cluster	48	84	66	

Note* The Woodcock is normed up to grade 16.9, i.e., college graduates.

Plaintiff's percentile rank thus represents the proportion of college graduates in a demographically representative sample who scored below her on the test.

b) clinical observations

Dr. Heath, a clinician with an extensive background in diagnosing learning disabilities in adults, did not purport to diagnose plaintiff in his evaluation to the Board, but only to confirm Dr. Massad's diagnosis and supply plaintiff with the Woodcock scores requested by the Board. (Pl.'s Ex. 16, Heath's Psychoeducational Evaluation; Heath Aff. p 52; Tr. at 505-06.) In his evaluation, however, Dr. Heath described plaintiff as a "dyslexic adult" in his evaluation. (Pl.'s Ex. 16, Heath's Psychoeducational Evaluation, at 2.) Moreover, he noted in his evaluation that "Dr. Bartlett decoded words slowly and without automaticity; self-corrections were common." (*Id.* at 1.)

Further, in describing her reading tests, he noted that "[s]he read [ ] passages slowly, and she typically read the more complex passages two or three times in order to ascertain their meaning." (*Id.* at 2.)

In his trial affidavit, Dr. Heath described his observations more fully:

> 58. In administering the Woodcock to plaintiff, I observed several things which are relevant to and supportive of my opinion that the plaintiff has learning disability. First, I noticed that she had to make several attempts to sound out words which should have been second nature to her. She [sic] reading was full of hesitations, and self corrections. In other words, plaintiff will attempt to read a word such as "instigator" as "investigator." Since she will hear that it sounds incorrect she will start over and often corrects her reading of the word after several attempts. On the Woodcock, this would be credited as a correct response, even though it took her three attempts to get it right and took more time than it would have taken a person who did not have to read in this fashion.
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> 59. Second, I observed that she needs to use her finger to keep her place when reading a paragraph in the passage comprehension subtest. The paragraphs on this subtest are only three to five lines long and yet plaintiff has difficulty keeping her place when reading.
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> 60. Third, I observed that plaintiff reads aloud in a hesitant manner, slowly and without automaticity. Automaticity is the phenomenon by which a person recognizes a printed word and is able to read it accurately, and immediately; in other words, automatically and without thinking. In particular, plaintiff had a great deal of difficulty reading polysyllabic words, vowels (espe-

cially diphthongs, digraphs and in ascertaining differences between long and short vowels), consonant blends and silent consonant conventions.

61. Fourth, I also observed that on the more complex reading passages, Dr. Bartlett typically read the passages over two or three times before she could respond to that test item. She uses contextual cues to facilitate her decoding. She reads very slowly. She will reread a phrase or sentence to make sure she gets it. You can often see her lips move or hear her read quietly to herself and when she does this, you can hear the mispronunciations. When she is faced with an unfamiliar polysyllabic word she is very slow to break down the word to different parts and she will mispronounce parts of the word. She is slow to synthesize the morphemes into a word.

In his trial affidavit, Dr. Heath also opined that the results of the Woodcock test he administered were consistent with Dr. Massad's diagnosis:

As I mentioned earlier, I observed the plaintiff needed to sound out words slowly and with repeated attempts. This pattern of word attack is indicative of someone whose decoding skills are not fully formed. Word attack skills are generally well formed by junior high school age. Plaintiffs scaled are on the Word Attack subtest form G was 91, 28th percentile with a grade equivalent of 4.7. Thus, in laymen's terms plaintiff decodes pseudo-words at a fourth grade level. This is a strikingly different performance from what one would expect of a person whose Passage Comprehension score on the same form of the test (G) was 110 or the 74th percentile.

(Heath Aff. p 62.)

Dr. Heath further described plaintiff as suffering from a "mild to moderate" reading disability. (Tr. at 507.) Dr. Heath utilizes the same diagnostic approach as Dr. Massad, viewing a learning disability as "intraindividual or intrinsic to the nature of the individual." (Heath Aff. p 47.)[7] Dr. Heath uses a history, neuropsychological battery, intelligence tests and achievement tests to diagnose learning disability. He looks for variation between the verbal and performance IQ scores on the WAIS, discrepancies between timed and untimed subtests, and errors in subtests. (Heath Aff. p 40.)

In the evaluation he submitted to the Board, Dr. Heath identified the difference between plaintiff's Basic Skills Cluster score and Reading Comprehension Cluster score as consistent with dyslexia:

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[7] Dr. Heath prefers the definition of learning disabilities adopted by the National Joint Committee on Learning Disabilities ("NJCLD"), which reads:

> Learning disabilities is a general term that refers to a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual, presumed to be due to central nervous system dysfunction, and may occur across the life span. Problems in self-regulatory behaviors, social perception, and social interaction may exist with learning disabilities but do not by themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (for example, sensory impairment, mental retardation, serious emotional disturbance) or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction), they are not the result of those conditions or influences.
>
> (Pl.'s Ex. 96, Donald D. Hammill, *On Definind Learning Disabilities: An Emerging Consensus*, 23 J. Of Learning Disabilities 74, 77 (1990) (quoting 1988 NJCLD 1).)

> [Bartlett's] pattern of decoding errors, as well as the significant discrepancy between her basic reading skills (43rd percentile) and reading comprehension (89th percentile), are consistent with a language-based learning disability.

(Pl.'s Ex. 16, Heath's Psychoeducational Evaluation, at 2.) At trial, he also maintained that any discrepancy between IQ and achievement scores over 1.5 standard deviations was strong evidence of a learning disability. (Heath Aff. p 71.)

3. ROSA A. HAGIN, Ph.D. (Examination in September 1994)

a) test results

Woodcock Reading Mastery Test--Revised

	Form G % ile (age)	Form H % ile (age)
Word Attack	50	50

Diagnostic Reading Test ("DRT") *

	Form C (timed)	Form A (untimed)
Comprehension	50th % ile	98th % ile
Speed	4th % ile (195 wpm)	>1st % ile (156 wpm)

Note FN* The DRT is not age normed. The highest grade norm is college freshmen, and thus plaintiff's score is ranked against that group.

Wide Range Achievement Test	% ile (age)

Oral Reading	86
Spelling	45

Neuropsychological Battery

Bender Gestalt Visual Motor Test:	2/9 figures recalled
Phoenician Spelling Test (spelling nonsense words):	19/20 correct
Trailmaking Test:	Speed abnormally low, poor visual scanning
Purdue Pegboard:	Normal speed, but poor laterality
Extension Test:	Equivocal laterality
Finger Gnosis:	4/7 errors, most on left; poor laterality
Directionality	5/7 errors in directional orientation

b) clinical observations

Dr. Hagin has been among the nation's leading researchers in the field of learning disability for more than two decades and is the author of many books and articles on the subject. She holds faculty appointments at Fordham University and in the Department of Psychiatry at New York University Medical Center, and supervises clinics at both institutions. She examined plaintiff in preparation for trial and served as her lead expert witness.

Dr. Hagin opined, based on Drs. Massad's and Heath's evaluations and her own, that plaintiff "has a learning disability consistent with the National Joint Committee on Learning Disabilities definition." (Pl.'s Ex. 93, Hagin's Psychological Evaluation, at 3; *see* definition *supra*, note 7.) Dr. Hagin placed considerable emphasis on the DRT results, which she viewed as demonstrating plaintiff's slow rate of reading. She also based

her opinion on: (a) the 17-point discrepancy between plaintiff's WAIS verbal and performance scores, which Dr. Hagin asserted occurs in less than 20% of the population; (b) neuropsychological findings suggesting "central nervous system dysfunction"; (c) variations of 1 1/2 standard deviations or more among WRMT subtest scores and WAIS subtest scores; (d) an 18-point discrepancy between the verbal IQ score and the Word Attack scores, which Dr. Hagin asserted occurs in 5% of the population; (e) plaintiff's performance on a 53-word writing sample, which was "laborious" and contained five spelling errors, and (f) achievement test scores that, overall, contrast with plaintiff's superior cognitive abilities and academic achievement. (Pl.'s Ex. 93, Hagin's Psychological Evaluation at 3.)

Of central importance in her diagnosis is Dr. Hagin's view that plaintiff has evolved a set of personal skills to compensate for her disability:

> She used several kinds of cues to assist her in responding to the tasks presented: slowing down the rate of response, verbal rehearsal of rote sequencing items, pointing cues to assist in keeping her place on visual text.

(Pl.'s Ex. 93, at 2.) Dr. Hagin believed that plaintiff's earlier work as a school teacher where phonics were stressed allowed plaintiff to develop "self-accommodations" that account for her ability to spell better and to perform better on word identity and word attack tests than would be expected of a reading disabled person.

According to Dr. Hagin, a learning disability's diagnosis cannot be made "on the basis of any one score or any one test. It made [sic] based on a total picture." (Hagin Aff. p 110.). For this reason, she prefers the NJCLD definition of learning

disability.[8] Although many of plaintiff's achievement scores fell in the average range when compared with plaintiff's age group, Dr. Hagin's judgment is that "one's educational level and expectancy" and clinical judgment should be dispositive in identifying a learning disability rather than test scores based on age norms. "Clearly, graduation from law school denotes a high level of achievement and correlated expectancies." (Hagin Aff. p 123.)

Dr. Hagin believes that Dr. Vellutino's definition of dyslexia as solely a phonological decoding problem is too narrow. (Tr. at 698.) She views the reading task as more complex than simply identifying words. The reading process also requires understanding what text means. (Tr. at 695-96.) To Dr. Hagin, because the Woodcock tests relied upon by Dr. Vellutino do not test automaticity or reading rate, they are poor indicators of a decoding problem in individuals like plaintiff who function at higher cognitive levels. (Tr. at 699-703.) Dr. Hagin notes that the DRT is a "very easy test"--comparable to reading a passage in *Reader's Digest.* Dr. Hagin expects a college-educated person to read DRT passages at the rate of 300 words-per-minute. Instead, plaintiff read at 195 words-per-minute timed--the fourth percentile compared to college freshman, and 156 words-per-minute untimed--below the first percentile compared to college freshman. (Tr. at 435, 701, 1050-51, 1092.) According to Dr. Hagin, plaintiff should have been performing at the 50th percentile of college freshmen, and instead reads very slowly when compared to a college student. (Tr. at 1050-51.)

For Dr. Hagin, the issue is not whether plaintiff can comprehend as she reads but the difficulty plaintiff has in the process of comprehending what she reads. (Tr. at 1076, 1632.)

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[8] *See* note 7, *supra.*

Dr. Hagin concludes that plaintiff does not read in the same condition, manner or duration of the average adult reader in that plaintiff does not read with the automaticity or speed of an average reader. (Tr. at 2494-98, 2545.)

4. Plaintiff's In-Court Demonstration

As part of plaintiff's proof, Dr. Hagin administered an in-court demonstration of plaintiff's reading and writing ability. Plaintiff was asked to read a passage describing a criminal law hypothetical from a 1988 bar exam, a document selected at random by the Court from among the exhibits, consisting of 426 words. Plaintiff read haltingly and laboriously, whispering and sounding out some words more than once under her breath before she spoke them aloud. Plaintiff marked the right-hand side of the text with her right index finger, advancing it down the right margin and using her left hand to read across the line. (Tr. at 748.) She made one word identification error, reading the word "indicted" as "indicated." Plaintiff's reading speed was approximately 40 words per minute.

Plaintiff was also asked to write a 48-word passage as it was dictated to her. The specimen produced, Plaintiff's Exhibit 174, has six grammar and spelling errors ("families" for "family's," "prapar" for "prepare," "Dave" for "David," "brotha" for "brother," "inaddvertently" for "inadvertently" and "omited" for "omitted"), and three words crossed out at the right margin which appear to have been written backwards or in "mirror writing." It took plaintiff approximately 10 minutes to complete the task.

Another specimen of plaintiff's handwritten work product admitted into evidence was her essay answers on the February 1993 New York Bar Examination, consisting of 38 single-spaced pages. (Pl.'s Ex. 185; Def.'s Ex. B.) Omitting what are commonly understood shorthand condensations of words (*e.g.*,

"managemt" for "management,"), I count 10 spelling errors. There are no examples of mirror writing, and the handwriting is generally legible. Plaintiff completed all six of the essay questions.

The Court recognizes that the trial setting undoubtedly affected plaintiff's performance in the courtroom demonstration. Therefore, the Court places limited value on the demonstration. The Court instead relies upon Dr. Hagin's and Dr. Heath's testimony of what they saw during their evaluation of the plaintiff and uses the demonstration only as illustrative of some of the phenomena Dr. Hagin and Dr. Heath described during their testimony.

B. *Defendants' Expert Opinions*

1. FRANK R. VELLUTINO, Ph.D.

At all relevant times, the Board employed a research psychologist expert in the field of learning disabilities, Dr. Frank R. Vellutino, to advise it on policies relating to the identification and accommodation of learning disabled applicants, and to screen applications for accommodations. Dr. Vellutino is a leading researcher in the field of learning disabilities and has published numerous books and articles on the subject. His primary experience is with children. He is a Professor in the departments of Linguistics, Psychology and Educational Psychology and Statistics at the State University of New York at Albany. He also supervises a clinic engaged in the identification and treatment of children with dyslexia.

In its rules and regulations, the Board does not specify what tests, if any, applicants for accommodations should submit with

their applications.[9] Dr. Vellutino prefers to receive scores from each of the Woodcock Reading Mastery Test--Revised Word Attack and Word Identification subtests in evaluating applicants claiming a reading disability. The Board advises applicants of Dr. Vellutino's preferences if they call or write asking which test results they should submit. Even if an application does not provide results from the Woodcock test, Dr. Vellutino will examine the results from whatever tests are submitted and evaluate whether those test results contain a word identification/word attack component sufficient to support the clinician's conclusions.

The Woodcock Word Attack test requires a subject to sound out nonsense words and is thus a test of a person's ability correctly to associate letter combinations with their sounds, a task referred to as phonological decoding ability. A subject is presented with 45 separate words, beginning with simple one-syllable patterns (*e.g.*, "ip" and "din") and progressing to more complex combinations (*e.g.*, "ceisminadolt" and "gnouthe"). The Woodcock Word Identification test requires a subject to identify 106 real words in isolation that range from simple ("is") to difficult ("zymolysis"). Both tests are untimed, and the scores do not reflect incorrect tries that precede a correct answer.

Dr. Vellutino discounts the significance of discrepancies in test scores as an identifier or discriminator for learning disabilities in an individual because even superior readers have discrepancies in scores. (Tr. at 1787-88 (noting that IQ/Achievement discrepancies are present in both good and poor readers); Vellutino Aff. p 14 (stating that discrepancy reported in Dr. Bartlett's scores is contrary to that found in reading disabled applicants because she has higher score in verbal skills than performance skills).) Similarly, Dr. Vellutino claims that

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[9] *See* note 33, infra.

research studies demonstrate that problems with spelling do not define a learning disabled person because "there are many good readers who are also poor spellers." (Vellutino Aff. p 14.) Neither do visual spatial organization problems, directional confusion or the like identify a reading disabled individual for Dr. Vellutino. (Tr. at 1173 (reporting that "in every piece of research we've done ... we get no differences between poor and normal readers" in performing these tasks); *id.* at 1200 (stating he does not believe that Dr. Hagin's tests are "important diagnostic signs").)

Dr. Hagin concurs with Dr. Vellutino that a discrepancy in scores or difficulty in other visual or spatial functions do not identify a learning disabled individual, but she believes that the discrepancies and task malfunctions can signal the existence of a disability. (Hagin Aff. pp 116, 126.) In Dr. Bartlett's case, as discussed, Dr. Hagin notes that plaintiff performed poorly on directional task tests; further, Dr. Hagin clinically observed the effect of such confusion upon plaintiff's reading in plaintiff's use of her finger to track left to right reading, and in plaintiff's frequent skipping of a line when returning to the right side of the page. (Tr. at 748-49.)

According to Dr. Vellutino, directional reading confusion exists in both learning disabled and nonlearning disabled children, and many adults retain vestiges of childhood coping mechanisms for reading difficulties. (Tr. at 1849-50.) Because the signals relied upon by Dr. Hagin are not, according to him, discriminators of learning disability, Dr. Vellutino believes that a diagnosis of dyslexia can only "be based exclusively on measures of reading ability, in particular measures of Word Identification and phonetic decoding or word analysis skills (ability to 'sound out' a word), deficiencies in which are characteristic of individuals with severe reading disability." (Vellutino Aff. p 33(a).) The only tests available which measure these functions are the Woodcock Reading Mastery Test--Revised or

the Woodcock-Johnson Psychoeducational Test Battery. (*Id.* p 33(c).) Dr. Vellutino prefers the Woodcock Reading Mastery Test over the Woodcock Johnson because the Mastery Test is more comprehensive. (*Id.*) Moreover, Dr. Vellutino believes the Word Attack subtest, is the most "direct measure of phonological dyslexia." (Tr. at 1804.)

Based on his view that a reading disability must affect an applicant's ability to perform on reading function tests like word attack and word identification, Dr. Vellutino recommended to the Board that it automatically grant accommodations to applicants claiming reading disabilities if their scores on the Woodcock Word Attack and Word Identification tests are below the 30th percentile when age-normed or grade-normed. (Vellutino Aff. p 33(e); Tr. at 2058 (defining "significantly impaired in reading" as "deficiency in reading subskills").) Dr. Vellutino recommended the 30th percentile cutoff on the basis of studies showing that the incidence of learning disability in the population is estimated at between 5% and 20% and thus, a 30% cutoff, according to him, would be reasonably certain to capture all disabled applicants. (Vellutino Aff. p 32; *see also* Tr. at 1305-06 (describing his choice of a 30th percentile cut-off as arbitrary, but not irrational because the cut-off is overinclusive).) Dr. Vellutino admits that scores on the Woodcock, and hence his cut-off, do not distinguish reading disabled applicants who read slowly from purely slow readers. (Tr. at 2401-02.)

Dr. Vellutino, however, will give applicants the benefit of doubt and has recommended accommodations for an applicant if either their Word Attack or Word Identification score is below 30% or 1 or 2 percentage points above, or other subset reading scores show marked deviations from the average range or are marginal. (*See, e.g.*, Pl.'s Ex. 123-A68; Tr. at 2080-84, 2089, 2094, and 2123.)

Plaintiff scored in the 29th percentile on the Word attack test given by Dr. Heath but Dr. Vellutino did not give her the benefit of the doubt or recommend accommodations for her because he considered that one score an anomaly among other test scores that demonstrated above average, if not superior, reading functions. Moreover, he viewed that score as within an average range. (Tr. at 1303-05, 2118-19, 2167.) Dr. Vellutino also discounted Dr. Hagin's characterization of plaintiff as a slow reader because he viewed plaintiff's performance at the rate of 195 words-per-minute on the DRT test as within average range. (Vellutino Aff. p 62; Tr. at 1212-15.) In reaching this conclusion, Dr. Vellutino relied upon various studies of reading rates and extrapolated from them that plaintiff's DRT was within the normal range, despite the 4% untimed college norm and 1% timed college norm of the test. (Tr. at 1822.) Finally, Dr. Vellutino assumes that anyone who can score above the 30th percentile in Forms G and H of the Woodcock has sufficient automaticity to read most texts. (Tr. at 2405.) In short, Dr. Vellutino recommended against giving Dr. Bartlett accommodations because he has "rarely" seen clinical findings of a significant disability with such high test scores. (Tr. at 1314; *but see* Pl.'s Ex. 123-18; Tr. at 2161 (applicant with scores much like plaintiffs who Dr. Vellutino recommended for accommodation).)

2. DR. JACK M. FLETCHER

Dr. Fletcher holds professorships at the University of Texas Medical School at Houston and the University of Houston. He is a psychologist and holds a diplomate in neuropsychology. He has published widely on dyslexia and neuropsychology, and devotes half of his time to clinical practice, principally, but not exclusively, with children.

Earlier in his career, Dr. Fletcher wrote articles criticizing Dr. Vellutino's approach to the diagnosis of learning disabilities.

(Fletcher Aff. p 9.) However, based on his own research and that of others, Dr. Fletcher has concluded that Vellutino's approach is the only valid approach for identifying a learning disability. (*Id.* ("Over the years, Dr. Vellutino's original hypotheses concerning the cognitive basis of reading disability have been shown to be correct. His early hypotheses presaged the now widely accepted understanding that reading disabilities have a linguistic basis and specifically reflect fundamental problems with the development of word decoding abilities that, in turn, reflect deficiencies in the acquisition of phonological awareness skills.").) After examining plaintiff's evaluation reports, he concluded that plaintiff was neither impaired nor disabled. (Fletcher Aff. p 11.) He concurred fully with Dr. Vellutino's evaluation of plaintiff's application for accommodations. (Fletcher Aff. p 47.)

C. *Plaintiff's evidence of disability.*

1. Psychometric Testing.

The experts in this case disagreed on much, but none challenged the efficacy of psychometric testing *per se.* Plaintiff's experts use the same cluster of achievement tests as defendants' experts to assess the presence of a reading disability. These tests have been standard in the psychology discipline for decades. The tests have gained acceptance in the field in part because statistical measures of their reliability are positive.[10]

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[10] For the Woodcock, median split-half reliability coefficients (using the Spearman-Brown formula) range from .84 to .98. (Pl.'s Ex. 183 at 912.) The Tenth Mental Measurements Yearbook, a guide viewed by plaintiff's lead expert, Dr. Hagin, as authoritative, (Tr. at 551), concludes:

> [t]he Woodcock Reading Mastery Tests--Revised is a reliable instrument useful in measuring *some aspects* of the reading process. Used in conjunction with the more valid process-oriented measures, the WRMT-R can potentially contribute to a thorough review of a subject's

Plaintiff's experts mention, as a general proposition, that test scores alone can not reliably identify reading disabled individuals, and they criticize Dr. Vellutino's reliance on the Woodcock for identifying adults with a reading disability. I agree with plaintiff's experts.

Plaintiff's experts have persuaded me that plaintiff's reading disability cannot be measured solely by psychometric testing. For example, no test measures automaticity directly. (Tr. 489, 503, 702.) A lack of automaticity in understanding words without undue attention to them is usually inferred from a combination of test scores and clinical observations. (Tr. at 701-02.) In this case, all three of plaintiff's experts noted plaintiff's stark lack of automaticity when she was required to read aloud. On the Woodcock tests themselves, plaintiff had to sound out the words repeatedly before coming to an answer. Plaintiff's lack of automaticity is further confirmed by her slow rate of reading compared to college freshmen on the DRT test. In that test, plaintiff's timed reading rate of 195 wpm compared to the 4% percentile of college freshmen. Finally, plaintiff's reading test data was not consistent across a wide range of reading-related skills. As noted by Dr. Heath and Dr. Hagin,

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reading growth.

(Pl.'s Ex. 183 at 913) (emphasis added). *But see*, Pl.'s Ex. 183 at 916 (A second reviewer concluded that the diagnostic value of the WRMT--R is "debatable" and that "evidence offered in support of the reliability and validity ... must be judged inadequate.") The percentile rankings derived from the scores, however, are accurate to within plus or minus 5 points. (*Id.*) The fact that plaintiff was tested on both Forms G and H increases the statistical reliability of the scores.

For the Wide Range Achievement Test--Revised, all the subtests administered to plaintiff have a reliability of .91 or better as determined by test-retest measures. (*Id.* at 902.)

plaintiff's high comprehension scores were incongruent with her relatively lower Word Attack and Word Identification scores.

I find seriously infirm Drs. Vellutino and Fletcher's presumption (albeit according to them rebuttable presumption) that a score above the 30th percentile on the Woodcock Word Attack and Word Identification subtests in all cases identifies the absence of a reading disability. As admitted by Dr. Vellutino, such a screening mechanism suffers from serious problems where an applicant's other scores and clinical reports place him or her at or below the average on other reading skill indicators. (*See, e.g.*, Tr. at 2107). Further, the best evidence for the Woodcock's shortcomings comes from defendants' experts and the scientific evidence upon which they rely.

To support their testimony, both Drs. Vellutino and Fletcher relied principally on the studies of adult dyslexics conducted by Dr. Maggie Bruck. (Tr. at 280, 1780.) Yet, Bruck found the Woodcock subtests poor discriminators for a learning disability unless the subject's reaction time was measured. (Defs.' Ex. JJ at 444; Pl.'s Ex. 149 at 262 ("[I]t is the slowness of reading that is particularly characteristic of the deficient word recognition skills of adult Dyslexics").) The Woodcock is an untimed measure of phonological decoding ability and does not score for reaction time. Further, both Dr. Fletcher and Dr. Vellutino do not credit clinical reports of lack of automaticity. Yet, Dr. Vellutino did acknowledge the Woodcock's weakness with regard to discriminating for lack of automaticity. (Tr. at 2305.)

A second criticism of the tests is that they are designed principally to test children and thus do not have enough items in the difficult range. Dr. Vellutino, in a recent research article, acknowledged the Woodcock has "severe limitations," in that "there are far too few items at any given level to be certain of reliability at that level." (Pl.'s Ex. 89 at 304 Vellutino, Scanlon & Tanzman, *Components of Reading Ability* (1994).) Further,

although Form G and H are supposed to be equivalent tests for norms, Dr. Vellutino admits that in his clinical experience Form G is harder than Form H. (Tr. at 1955.) Dr. Fletcher does not use these tests in his research.

Moreover, although Dr. Vellutino claims the 30th percentile cutoff is "over inclusive," Bruck reported that, using a test similar to the Woodcock, "one third of the subjects [adult Dyslexics] scored above the 30th percentile on the WRAT-R Level II." (Defs.' Ex. KK at 877.) In an earlier study of college-student dyslexics, the average score was at the 32nd percentile, with the range being from the 3rd to 81st. (Defs. Ex. JJ, Table 1, at 443.) Thus, despite Dr. Vellutino's insistence that the 30th percentile cut-off is over generous in identifying reading disabled applicants, the studies he relies upon provide testing data that show reading disabled college students performing well above the 30th percentile. Bruck reports that using a test similar to the Woodcock, "one third of the [adult dyslexics] subjects scored above the 30th percentile on the WRAT-R Level II." (Def. Ex. KK at 877). In an earlier study of college-student dyslexics, the average score was at the 32nd percentile, with the range being from the 33rd to 81st percentiles. (Def. Ex. JJ, Table 1, at 443).

Finally, I do not credit Dr. Vellutino's attempt to equate Bartlett's low DRT reading rate score with an average rate by extrapolation to other tests. This approach is seriously infirm in that it attempts to compare scores on different tests with different subject populations. As noted by Dr. Hagin, to be within the average range of college freshmen, plaintiff should have been performing at the 50th percentile of the DRT, and instead she reads at a very slow rate for the college student population which this test directly measures. (Tr. at 1050-51.)

In short, I do not accept Dr. Vellutino and Dr. Fletcher's conclusions that reading disabled individuals are incapable of

having the test scores reflected by plaintiff. Plaintiff's experts have convinced me that a reading disability is not quantifiable merely in test scores. A learning disability is not measurable in the same way a blood disease can be measured in a serum test. By its very nature, diagnosing a learning disability requires clinical judgment. Clinicians need to examine a patient to ensure that low or disparate scores are not the result of low intelligence, or emotional or other social problems. Moreover, I accept the opinion of plaintiff's experts, based on the studies of Dr. Maggie Bruck, that tests like the Woodcock are "poor discriminators" for adults. (Defs.' Exh. JJ at 444.) Thus, as much as the Board would like to find an easy test discriminator for a reading disability in its applicants, such a test does not exist. Finally, I also do not accept the position of defendants' experts that clinical judgments of a lack of automaticity must be rejected as subjective. Clearly, plaintiff's low, albeit within the average range, test scores on the Woodcock, combined with clinical observations of her manner of reading amply support a conclusion that she has an automaticity and a reading rate problem.

2. *Discrepancy versus performance measures*

Central to this case has been the contention by plaintiff's experts that reading disability can be identified by significant variations (one standard deviation or more) between either (i) intelligence (or aptitude) measures versus reading performance (or achievement) measures or (ii) within the discrete subskills comprising intelligence or within those comprising reading ability. This theory, commonly called the discrepancy theory, has engendered considerable controversy in the psychology profession.[11]

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[11] "Today, the value of these discrepancy formulas is one of the most hotly disputed issues in the field of learning disabilities." (Pl.'s Ex. 96 at 77 Donald D. Hammill *On Defining Learning Disabilities: An Emerging*

As applied to this case, the plaintiff's experts did not agree on a uniform measure of discrepancy and this fact undermined the discrepancy theory's validity. Dr. Massad defined it as a discrepancy between verbal IQ and decoding scores on the Woodcock, (Pl.'s Ex. 20(a), Massad's Psychoeducational Evaluation, at 5), or, in the alternative, between subtest scores on the Verbal Scale. (Tr. at 219.) Dr. Heath maintained that the most probative discrepancy measure was the differential between plaintiff's basic reading skills (the 43rd percentile) and her reading comprehension (89th percentile). (Pl.'s Ex. 16, Heath's Psychoeducational Evaluation, at 2.) Dr. Hagin testified that she uses the widest differential between an intelligence score and reading achievement scores. (Tr. at 1105 ("I think the expectancy estimate should be the most optimistic estimate.").) Perhaps even more confusingly, at the same that defendants'

Consensus, 23 *J. Learning Disabilities* 73, 77 (Feb.1990).)

Notwithstanding its contested basis, federal regulation and many states have adopted the discrepancy definition pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* IDEA lists learning disabilities as among those covered, 20 U.S.C. § 1401(a)(1)(A), the regulations define a learning disabled child as one who "does not achieve commensurate with his or her age and ability level" and "has a severe discrepancy between achievement and intellectual ability in ... [among other things] basic reading skill." 34 C.F.R. § 300.543. New York's definition tracks the federal rule, but quantifies "severe" as "a discrepancy of 50% or more between expected achievement and actual achievement ..." 8 NYCRR § 200.1(6). Forty-five states have adopted some form of the discrepancy definitions. (Pl.'s Ex. 168 at 149.)

The only case in this circuit to reach the issue of a disputed diagnosis of learning disability under IDEA found for defendants on the grounds that plaintiff's "overall scores on psychological tests ... ranged from average to below average," *Hiller v. Bd. of Educ. of Brunswick Cent. Sch. Dist.*, 743 F.Supp. 958, 975 (N.D.N.Y.1990), and that Dr. Vellutino's expert opinion in the case was more credible that plaintiff's experts. *Id.* at 971 n. 50.

expert, Dr. Vellutino, strongly criticizes the discrepancy theory, he avows an adherence to a definition of dyslexia that appears to approve explicitly the discrepancy theory. Specifically, Dr. Vellutino subscribes to the following "research definition" of dyslexia promulgated by the Orton Dyslexia Society:

> Dyslexia is one of several distinct learning disabilities. It is a specific language-based disorder of constitutional origin characterized by difficulties in single word decoding, usually reflecting insufficient phonological processing abilities. *These difficulties in single word decoding are often unexpected in relation to age and other cognitive and academic abilities,* they are not the result of generalized developmental disability or sensory impairment. Dyslexia is manifested by variable difficulty with different forms of language, often including, in addition to problems reading, a conspicuous problem with acquiring proficiency in writing and spelling.
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> (Pl.'s Ex. 94.) (emphasis added).

A standard that adopts a purely self-referential measure of an impairment's severity, however, is fraught with danger as it is likely to be both under and over inclusive.[12] In assessing reading disability, individuals with very high IQ scores but average reading ability will be found disabled, although their

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[12]*But see In re Petition of Rubenstein,* 637 A.2d at 1133 (crediting discrepancy definition as basis for diagnosis of learning disability); *Pazer v. New York State Bd. of Law Examiners,* 849 F.Supp. at 287 (finding "some merit" to discrepancy theory but ruling for defendants on grounds that Dr. Vellutino's opinion and average to superior test scores refuted plaintiff's claim that he had a learning disability).

reading skills may be less developed because of any number of factors other than the presence of a disorder:

> All persons have some mental or physical deviations from the norm. However, such inherent limitations or deviations from the norm do not automatically constitute handicaps.

American Motors Corp. v. Labor and Indus. Review Comm'n, 119 Wis.2d 706, 350 N.W.2d 120, 123-24 (1984). Under inclusion would result from a methodology which excluded individuals whose IQ and reading scores were both below the norm, but not widely enough apart to trigger statistical significance. As will be discussed, *infra,* the Rehabilitation Act presumes resort to an extrinsic average to define disability, and I believe Congress intended to adopt such a standard in defining disability under the ADA.[13]

I do not need, however, to decide whether the discrepancy theory is scientifically valid. I accept Dr. Hagin's position that deviations or discrepancies in test scores should only be used as an indication that a learning disability exists. They do not,

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[13]In the EEOC's interpretive guidance to its regulations promulgated under Title I, it explained that:

> An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at a moderately below averages speed.
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> 29 C.F.R. Pt. 1630, App. Section 1630.2(j).

standing alone, identify a learning disabled person. Clinical judgment, including the elimination of other potential causative factors, must then be used to identify a learning disability. I accept Dr. Vellutino's proposition that the absence of a statistical correlation between deviations in test scores and a learning disability makes them an inappropriate diagnostic discriminator. Nevertheless, this does not *a fortiori* mean that deviations are not helpful in identifying a learning disability. It simply means that tests score deviations do not, standing alone, identify a learning disabled person. Because a learning disability is not susceptible to metric testing, clinical judgment must be used to identify whether the deviation in a particular case reflects the existence of a learning disability.

CONCLUSIONS OF LAW

I adopt herein any Finding of Fact previously set forth which might more properly be deemed a Conclusion of Law.

I. PLAINTIFF'S ADA AND REHABILITATION ACT CLAIMS

As noted previously, the threshold issue in any claim brought pursuant to the ADA or Section 504--and therefore the underlying determination upon which all of plaintiff's claims, both statutory and constitutional, are based--is the determination whether the claimant is substantially impaired, and hence disabled, as defined by the law. *See Flight v. Gloeckler,* 68 F.3d 61 (2d Cir.1995); *Argen v. New York State Bd. of Law Exam'rs,* 860 F.Supp. 84, 86 (W.D.N.Y.1994); *Pazer v. New York State Bd. of Law Exam'rs,* 849 F.Supp. 284, 287 (S.D.N.Y.1994). The burden of proof, of course, is on plaintiff and it is satisfied by the preponderance of the evidence. *See Borkowski v. Valley School District,* 63 F.3d 131, 145-48 (2d Cir.1995) (discussing plaintiff's burden of preponderance of the evidence) (Newman, C.J., concurring).

A. *Background: The ADA and Section 504*

The ADA and Section 504 of the Rehabilitation Act define disability with nearly identical language.

> The term "disability" means, with respect to an individual--
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (Supp.1995) (ADA); *see* 29 U.S.C. § 706(8)(B) (Supp.1996) (Rehabilitation Act, as amended). By enacting the ADA,Congress explicitly intended to expand upon the foundation laid by the earlier enacted Rehabilitation Act:

> The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local government or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance.

H.R. 101-485(II), 101st Cong. (1990), *reprinted in* 1990 4 U.S.C.C.A.N. 303, 366. The ADA's legislative history contains many references to judicial opinions construing Section 504. *See, e.g., id.* at 354 (citing *Stutts v. Freeman*, 694 F.2d 666 (11th Cir.1983)). I thus conclude that Congress intended courts construing the ADA to use relevant precedent developed under the Rehabilitation Act. As will be discussed, cases defining

substantial impairment in the employment context are particularly useful in determining the elements of the substantiality test generally.

Plaintiff claims the following are "major life activities" in which she is impaired: learning, reading, writing, studying, test-taking and, alternatively, working. (Pl.'s Post-Trial Mem. at 5, 9.)

The regulations promulgated under Title II of the ADA define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 28 C.F.R. § 35.104(1)(iii)(2) (1991).[14] More instructive are the regulations promulgated under Title I by the Equal Employment Opportunities Commission ("EEOC") which define major life activities as "those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. Pt. 1630, App. § 1630.2(i) (1991). By this standard, which I accept, all of plaintiff's proposed activities qualify as major life activities. Only test-taking could arguably not be "basic." But in the modern era, where test-taking begins in the first grade, and standardized tests are a regular and often life-altering occurrence thereafter, both in school and at work, I find test-taking is within the ambit of "major life activity."

The Rehabilitation Act covers a "specific learning disability."29 U.S.C. § 706(15)(A)(iii) (1996 Supp.). Congress explicitly intended that learning be considered a major life activity and that learning disabilities be covered under the ADA

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[14]The ADA is divided into five titles: Title I addresses discrimination by private employers; Title II by public entities; Title III in public accommodations and services operated by private entities; Title IV in telecommunications; and Title V contains miscellaneous provisions.

as well. *See, e.g.* H.R. 101-485(II), 101st Cong. (1990), *reprinted in* 1990 4 U.S.C.C.A.N. 303, 333-34 ("A ... mental impairment means ... any ... psychological disorder, such as ... specific learning disabilities." "A 'major life activity' means [inter alia] ... learning ..."). The ADA's regulations track this language. *See* 28 C.F.R. § 35.104(1)(i)(B) (as to public entities, a mental impairment means "[a]ny mental or psychological disorder ..., and specific learning disabilities"); 29 C.F.R. § 1630.2(h)(2) (as to private employers, same). The experts who testified at trial agreed that reading is the major life activity most commonly affected by learning disabilities, with reading disabilities accounting for approximately 70-80% of all those diagnosed as learning disabled. (Fletcher Aff. p 12.) Clearly reading is a major life activity, as other courts have found. *See, e.g., Pridemore v. Rural Legal Aid Society,* 625 F.Supp. 1180, 1183-84 (S.D.Ohio 1985). Writing is also indisputably a major life activity.

For purposes of this case, plaintiff's claimed disability collapses into an inability to read like the average person on tests like the bar examination, for that is the skill that plaintiff claims constricts her ability to engage in all the other relevant major life activities. Also, and in the alternative, I will address plaintiff's contention that she is substantially impaired in the major life activity of working. The EEOC regulations provide the following definition for substantial limitation in the major life activity of working:

> With respect to the major life activity of working--
>
> (i) The Term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the *average person having comparable training, skills and abilities.* The inability to perform a single,

particular job, does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (emphasis added).

B. *Application of the Statutes to Defendants*

Defendants do not contest that Titles II and III of the ADA apply to them. Title II reads:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Further, the Department of Justice was charged with enacting regulations under Title II, which read, in pertinent part:

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.

28 C.F.R. § 35.130(b)(6) (1991).[15]

Defendants argue, however, as a predicate matter, that they are beyond the reach of the Rehabilitation Act, which applies

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[15]For a further discussion of Title II and Title III in the context of employment exams such as the bar examination, *see* part F., *infra*.

only to recipients of federal funds. Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....
>
> 29 U.S.C. § 794(a) (1996 Supp.).

The Board argues it is merely a conduit for crediting back to the state federal funds it receives for the benefit of disabled applicants. These funds are monies the state receives to pay the bar application fee of disabled applicants that are credited to the Board and then deposited by the Board in the State's general fund. According to the statute itself, however, any of the following receiving federal funds are covered by the Rehabilitation Act:

> (b) 'Program or activity' defined
>
> For the purposes of this section, the term 'program or activity' means all of the operations of--
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or local government; or
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> (B) the entity or such State or local government that distributes such assistance *and each such department or agency* (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State of local government.

29 U.S.C. § 794(b)(1) (emphasis added).

There is no dispute that the Board is a creature of the State. Defendants argue, however, that there is an insufficient nexus between them and the federal funds because the Board lacks the discretion to use the money. Nevertheless, the relevant issue is whether the State or the Board have the discretion under State law to refuse the federal funds altogether. *See Grove City College v. Bell,* 465 U.S. 555, 575, 104 S.Ct. 1211, 1222, 79 L.Ed.2d 516 (1984) (holding that "indirect" receipt of federal funds, such as student loans, still qualifies as federal funding for purposes of Title IX; the school had discretion to discontinue accepting such federal funding to be freed from Title IX's dictates). Because the Board and the State could refuse the federal programs that require them to accept payment of an applicant's fee from the federal government, by electing to accept the money, both the Board and the State consented to place the Board under the burdens of Section 504. What the State permits the Board to do with the money after the Board receives it is irrelevant.

With this understood, I move to consider plaintiff's claims under both the Rehabilitation Act and the ADA. Before I do so, however, I must address another predicate question which plaintiff proposes defines the burden of proof in establishing whether she is, in fact, disabled.

C. *The Treating Physician Rule*

Plaintiff first proposes that the Court apply to ADA cases the "treating physician rule" adopted by this Circuit in *Schisler v. Heckler,* 787 F.2d 76 (2d Cir.1986), as modified by *Schisler v. Bowen,* 851 F.2d 43 (2d Cir.1988). The pertinent language plaintiff relies upon states as follows:

> [A]treating physician's opinion on the subject of a medical disability, *i.e.*, diagnosis and nature and degree of impairment, is: (i) binding on the factfinder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians.
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> *Schisler*, 787 F.2d at 81.

Since this standard was adopted, the Department of Health and Human Services has promulgated its own rule, under which:

> [HHS gives] more weight to opinions from [plaintiffs] treating sources, since these sources are more likely to be the medical professionals most able to provide a detailed, longitudinal picture of [plaintiffs] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations.
>
> 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

As applied to this case, plaintiff maintains that the Board should have given more weight to the opinions of the two psychologists whose reports plaintiff submitted with her application for accommodations as compared to Dr. Vellutino's because (1) Dr. Vellutino never examined the plaintiff, and (2) her psychologists (a) used well-supported acceptable clinical diagnostic techniques, (b) were consistent, and (c) were well qualified, all factors the HHS rule and the Second Circuit cases consider. For the same reasons, plaintiff proffers Dr. Hagin's testimony as more weighty than that of either Dr. Vellutino or

Dr. Fletcher. I cannot agree that such a presumption should be automatically applied by either the Board or this Court.

The treating physician rule, in all its incarnations, is premised upon the existence of an ongoing therapeutic relationship between an applicant and a treating physician. HHS' regulation identifies a "treating physician" differently than "individual examinations, such as consultative examinations" of the type plaintiff's psychologists supplied. *See* 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). No ongoing relationship of substantial duration existed between plaintiff and her psychologists. For this reason, plaintiff's reliance upon *D'Amico* to support the use of a treating physician rule as a presumption in cases such as this one is misplaced. In *D'Amico,* the court chose, not as a presumption, but as an evidentiary matter, to give deference to a treating doctor based on a 20-year treatment relationship between the plaintiff and the doctor who reported upon her condition. *See D'Amico,* 813 F.Supp. at 222. Such a relationship does not exist here.

Moreover, in the treating physician cases cited by plaintiff, there is no fundamental difference of scientific opinion as to the very definition and testing criteria necessary to identify a disabling condition. Rather, it is the applicability of well-settled medical standards to particular patients that is at issue in the cases upon which plaintiff relies. Here, science has yet to yield either a definitive understanding of the etiology of learning disability or a consensus as to the best means of measuring or identifying it.

In short, whatever benefit the treating physician rule might have in social security disability cases, it is inappropriate to apply it as a presumption in ADA cases of this type. To the extent the Board may choose to avoid liability for an erroneous determination that a particular applicant is not disabled, the rule

may have some advantages.[16] A court may also, in the context of particular cases, choose, as an evidentiary matter, to give extra weight to an appropriate treating physician, but there is no basis in law to apply the presumption plaintiff seeks to all cases of this type.

D. *Substantial Limitation Under the Law*

1. *Determining the Appropriate Demographic Group for Comparison: Is the Practice of Law a Sufficiently Broad Category of Jobs*

As noted at the outset, the core issue to be decided in this case is whether plaintiff suffers a disability that "substantially limits" a major life activity within the meaning of the ADA. Because "substantially limits" is a necessarily amorphous concept, the Court must look to the regulations promulgated by the EEOC and to relevant case law to define its precise contours.

As to most major life activities, such as reading and learning, the EEOC's regulations, promulgated under Title I of the ADA, define the concept as follows:

1. The term substantially limits means:

(i) unable to perform a major life activity that the average person in the general population can perform; or

(ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the *average person in the general population* can perform that same major life activity.

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[16]For a discussion of how other bar examiners and some law schools evaluate learning disability applications, *see* note 33, *infra*.

29 C.F.R. § 1630.2(j)(1) (emphasis added).[17]

However, the EEOC regulations define substantial limitation in the major life activity of working differently:

> With respect to the major life activity of working--
>
> (i) The Term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the *average person having comparable training, skills and abilities*. The inability to perform a single, particular job, does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). As can be seen, the pivotal difference between the test for substantial impairment in most major life activities and the test for substantial impairment in the major life activity of working is the appropriate demographic group to whom the plaintiff will be compared. With respect to most major life activities, the plaintiff is compared to "the average person in the general population." 29 C.F.R. § 1630.2(j)(1). Therefore, to determine whether plaintiff is substantially impaired in her reading, learning, or even test-taking, I must decide whether, when

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[17]The commentary notes:

> Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact on an individual's life to the degree that they constitute disabling impairments.

29 C.F.R. § 1630. App. § 1630.2(j).

compared to the average person in the general population, plaintiff is substantially limited in these major life activities.

However, when I consider whether plaintiff is substantially limited in the major life activity of working, an entirely different reference group must be utilized. No longer is plaintiff compared to the "average person in the general population." Instead, the relevant comparison group is "the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). This becomes a crucial distinction in a case such as this one, where plaintiff's history of self-accommodation has allowed her to achieve great accomplishments, one of which includes roughly average reading skills (on some measures) when compared to the general population.

When plaintiff is compared to persons of "comparable training, skills, and abilities," however, a completely different evaluation of plaintiff's abilities emerges. All of her tremendous accomplishments through self-accommodation to the side, when compared to this population, plaintiff does not read like the average college student --- much less the average law school student. When compared to this population, her reading skills (which when compared to the general population are barely average) are well below normal.

There is an important caveat to this analysis, however. As the regulation regarding the major life activity of working provides, "[t]he inability to perform a single, particular job, does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). Rather, plaintiff must be "significantly restricted in the ability to perform either a *class* of jobs or a *broad range* of jobs in various classes...."*Id.* (emphasis added). The question then turns to whether plaintiff's attempt to compete in the bar examination as do other qualified candidates implicates an ability or inability "to perform either a class of jobs or a broad range of jobs in various classes." *Id.*

Foremost, there is no question that fairly competing in the bar examination --- thus making it possible that one could at least potentially pass the examination --- is a precondition to practicing as a lawyer.[18] Just as obvious is the fact that plaintiff is not entitled to an accommodation which will ensure that she actually *passes* the bar examination. Rather, the accommodation is given so that she might be able to compete on a level playing field with other applicants taking the bar examination.

If plaintiff's disability prevents her from competing on a level playing field with other bar examination applicants, then her disability has implicated the major life activity of working because if she is not given a chance to compete fairly on what is essentially an employment test, she is necessarily precluded from potential employment in that field. In this sense, the bar examination clearly implicates the major life activity of working. Without the successful passing of the bar examination that can only come after one has been given a fair opportunity to compete on the examination, an individual may be able to involve themselves in a narrow range of law-related activities, such as being a law school professor or a legal consultant. However, without a fair chance to compete for admission to the bar, a law school graduate is effectively excluded from performing "a class of jobs," most specifically, lawyering, including providing legal advice or performing all of the functions that comprise the essence of being a lawyer. Therefore, plaintiff's inability to read and take the bar examination as do other law school graduates has the effect of impeding her entry into a "class of jobs," as that concept is understood under the ADA. *Cf. Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626, 104 S.Ct. 1248, 1250, 79 L.Ed.2d 568 (1984) (noting that "[a]mong [the Rehabilitation Act's] purposes are 'to promote and expand employment opportunities in the public and private sectors for

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[18] *See* discussion of employment tests, part F., *infra*.

handicapped individuals and place such individuals in employment.' ").

I conclude that plaintiff's exclusion is much greater than an exclusion from "a single, particular job." 29 C.F.R. § 1630.2(j)(3)(i). She is excluded from performing any and all jobs that comprise the "class of jobs" known as the practice of law. Again, the interpretative regulations of the ADA promulgated by the EEOC are instructive on this point. They provide three additional factors that may be considered when determining whether there is a substantial limitation in the major life activity of working:

> (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of working.
>
> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii).[19] The first of these factors, the geographical area to which the individual has reasonable access, is somewhat irrelevant to this discussion because plaintiff's inability to compete on a level playing field for admission to the bar could potentially exclude her practice of law anywhere in the country. While she is only applying for admission to the New York State Bar, a large geographic area in and of itself, her inability to gain bar admission will also result in her inability to be admitted *pro hac vice* in other jurisdictions. Therefore, regardless of the range of plaintiff's reasonable geographic access, she is impeded from participating in the profession for which she labored for three years in law school. *See E.E. Black, Ltd. v. Marshall,* 497 F.Supp. 1088, 1101 (D.Hawai'i 1980) ("If an individual were disqualified from the same or similar jobs offered by employers throughout the area to which he [or she] had reasonable access, then his [or her] impairment or perceived impairment would have to be considered as resulting in a substantial handicap to employment.").

The next factor mentioned in the regulation suggests that a court examine "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). This is a crucial factor weighing in favor of a finding of plaintiff's

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[19]The interpretative guidelines attached to the EEOC regulations provide that:

> The terms "number and types of jobs" and "number and types of other jobs" as used in the factors ... are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., "few," "many," "most") from which an individual would be excluded because of an impairment.
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> 29 C.F.R. Pt. 1630, App. Section 1630.2(j).

substantial impairment. Her inability to read as well as the average law student--and her accompanying impairment in attempting to become bar-admitted--disqualifies plaintiff from a whole host of jobs which utilize the training, knowledge, skills or abilities of a law school graduate. Consider the number and types of jobs involving the practice of law in New York City alone, much less in the broader geographical market to which plaintiff has reasonable access. All of these countless jobs and opportunities are foreclosed to plaintiff as long as her failure to pass the bar examination is affected by the Board's refusal to accommodate her learning disability. While it may be said that plaintiff can utilize her law degree in other ways by becoming a law professor or legal consultant, the fact of the matter is that this small category of jobs represents a very small subset of the much broader class of jobs from which plaintiff is excluded by her inability to compete fairly and hence to have an opportunity to gain admission to the bar. *See Black,* 497 F.Supp. at 1101 (providing that a plaintiff's "own job expectations and training must be taken into account" in considering category of jobs from which plaintiff is excluded); *id.* at 1101-02 ("Certainly, if an applicant were disqualified from an entire field, there would be a substantial handicap to employment. But, questions as to subfields and the like must be answered on a case-by-case basis,.....").

The final factor to be considered under the EEOC regulations is "the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(C). The number and types of jobs that fall into this category are quite small, because plaintiff has not alleged that she is excluded from a

"broad range of jobs in various classes." *Id.*[20] Rather, she has alleged that she is excluded from one specific class of jobs: the practice of law. In sum, having considered these factors, I find that plaintiff is substantially limited in the major life activity of working because her inability to be accommodated on the bar examination--and her accompanying impediment to becoming bar-admitted--exclude her from a "class of jobs" under the ADA.

In promulgating these regulations, the EEOC attached (as an "Interpretive Guidance") a lengthy elucidation of the meaning of the regulations. On the question of the substantiality of an impairment in the major life activity of working, the EEOC wrote:

> [A]n individual is not substantially limited in working just because he or she is unable to perform a particular

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[20]As the EEOC interpretive guidance explains this factor, it looks to those individuals who are not excluded from any one class of jobs because of their impairment, but rather are excluded from a broad range of jobs in various classes because of their impairment. The EEOC writes:

> [A]n individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working.... For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.
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> 29 C.F.R. Pt. 1630, App. Section 1630.2(j).

> job *for one employer*, or because he or she in unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. *See Forrisi v. Bowen*, 794 F.2d 931 (4th Cir.1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir.1985); *E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088 (D.Hawai'i 1980).

29 C.F.R. Pt. 1630, App. Section 1630.2(j) (emphasis added). This interpretive guidance from the EEOC, and the examples it provides, lend further support to my finding that plaintiff has been substantially limited in the major life activity of working by her exclusion from the opportunity to participate in the "class of jobs" designated as the practice of law.

First, as previously noted, plaintiff is not excluded merely from "a particular job for one employer," *id;* rather, she is excluded from thousands of jobs by hundreds of employers. Furthermore, I cannot find under these regulations that the practice of law is "a specialized job or profession requiring extraordinary skill, prowess or talent." *Id.* Particularly in light of the example given--that of a baseball player with a bad elbow--I do not find that the regulation was intended to classify

the practice of law as a specialized profession. If it were, then every profession would be considered a specialized profession, because each contains its own "extraordinary skill, prowess, or talent." If such were to be the interpretation of the regulation, then many Americans with disabilities would be wholesale excluded from many of the most prominent, lucrative, and rewarding occupations known as "professions" --- such as doctoring, lawyering, and accounting. In light of the commentary given, I find the EEOC's language is not designed to apply to generalized professions but is designed to prevent challenges brought by a person who is dissatisfied because some impairment prevents him or her from being a qualified individual for a highly specialized job, such as that of a professional athlete.[21]

Case law, while somewhat murky in this area, is also instructive on the question whether the practice of law is a sufficiently broad category of jobs.

In *E.E. Black, Ltd. v. Marshall,* 497 F.Supp. 1088 (D.Hawai'i 1980),[22] one of the first published cases to address the question of what constitutes a substantial impairment in the context of the major life activity of working, the United States District Court in Hawaii reviewed the determination of an Administrative Law Judge ("the ALJ") that plaintiff's back condition--while an impairment--did not *substantially* impair his ability to work because it did not affect his "employment

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[21]For an excellent example of what the EEOC intended to prevent with the "specialized profession" language, *see* discussion of *Jasany v. United States Postal Service,* 755 F.2d 1244, 1249 (6th Cir.1985), part E., *infra.*

[22]*Black* has been relied upon by numerous courts as "the most comprehensive examination by a court to date" of the standards for finding disability under the ADA and the Rehabilitation Act. *See, e.g., Jasany v. United States Postal Service,* 755 F.2d 1244 (6th Cir.1985); *Padilla v. City of Topeka,* 238 Kan. 218, 708 P.2d 543, 549-50 (Kan.1985).

generally." The ALJ held that plaintiff must "demonstrate that the impairment ... impeded activities relevant to many or most jobs." *Id.* at 1094. The Hawaii district court reversed the ALJ's ruling, stating that the ALJ's test regarding "employment generally" was invalid. The Court explained that "this type of definition drastically reduces the coverage of the Act, and undercuts the purposes for which the Act was intended." *Id.* at 1099. The Court went on to explain:

> A person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger. A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities.

Id. Clearly, the same sorts of concerns that motivated the district court's ruling in *Black* are present here. Plaintiff struggled through three laborious years of law school---at no small fiscal or psychic cost. To tell her now that she is free to go and practice another profession, or to return to her prior field of education, would not be consistent with the remedial goals that Congress intended in passing the ADA.

Numerous courts have likewise held that in determining whether a plaintiff's impairment is substantial in the major life activity of working, the proper scope of inquiry is to the relevant employment at issue--not to employment generally or more broadly construed. *See, e.g., Cook v. State of Rhode Island, Dep't of Mental Health, Retardation, and Hospitals,* 10 F.3d 17, 25 (1st Cir.1993) (upholding jury's finding that "plaintiff's limitations foreclosed a broad range of employment options in the health care industry"---plaintiff's chosen field); *Welsh v. City of Tulsa,* 977 F.2d 1415, 1419 (10th Cir.1992) (where

plaintiff held degree in safety and failed to achieve position as firefighter because of numbness in his fingers, court specifically notes that plaintiff "did not show that his degree in Safety qualified him solely for the position of firefighter"); *id.* (also noting that plaintiff's "assumption that other fire departments would also misapply standards regarding employment of firefighters so as to disqualify him is only speculation. [Plaintiff] failed to present evidence like [a] vocational expert's opinion that the plaintiff would be precluded from performing not only the specific job for which she applied, but a wide range of jobs...."); *Taylor v. United States Postal Service,* 946 F.2d 1214, 1217 (6th Cir.1991) (noting with approval *Black* 's conclusion that plaintiff "would be substantially limited in obtaining his career goal"); *Forrisi v. Bowen,* 794 F.2d 931, 934 (4th Cir.1986) (requiring that plaintiff show that the impairment "foreclose *generally the type of employment involved* ") (emphasis added); *id.* (noting that plaintiff " 'had no difficulty in obtaining other jobs *in his field*' ") (emphasis added); *id.* (adding that "[f]ar from being regarded as having a 'substantial limitation' in employability, Forrisi was seen as unsuited for one position in one plant---and nothing more."); *Gupton v. Virginia,* 14 F.3d 203, 205 (4th Cir.) (plaintiff had to show that her allergy "foreclosed generally her opportunity to obtain *the type of employment involved* ") (citing *Forrisi v. Bowen,* 794 F.2d 931 (4th Cir.1986)) (emphasis added) (citations and internal quotations omitted), *cert. denied,* 513 U.S. 810, 115 S.Ct. 59, 130 L.Ed.2d 17 (1994); *id.* (describing prior holding that no disability is found where plaintiff "had shown no difficulty in obtaining other jobs *in his field* ") (citations and internal quotations omitted) (emphasis added); *id.* at 206 n. 4 (citing cases and explaining that plaintiffs in them were not foreclosed generally from "obtaining jobs doing *the type of work plaintiff has chosen as his field.*") (emphasis added); *Padilla v. City of Topeka,* 238 Kan. 218, 225, 708 P.2d 543 (Kan.1985) (endorsing *Black* 's rejection of "employment generally" test). *See also Wernick v. Federal Reserve Bank of New York,* 91 F.3d 379, 384

(2d Cir.1996) (citing cases); *Heilweil v. Mt. Sinai Hospital,* 32 F.3d 718, 723 (2d Cir.1994) ("An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one."); *id.* at 723-24 (citing cases); *id.* at 724 ("Nothing suggests plaintiff's education and previous job experiences would hinder her ability to find a suitable position in the general field of administration"---plaintiff's chosen career.); *Daley v. Koch,* 892 F.2d 212, 215 (2d Cir.1989) (plaintiff's impairment excluded him only from *particular position* of police officer) (emphasis added). ***But see Byrne v. Board of Educ.,*** 979 F.2d 560, 565 (7th Cir.1992) (*mis*quoting *Black* as providing that "an ability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally.").

Second Circuit precedent likewise acknowledges that the appropriate focus is not plaintiff's exclusion from employment generally, but instead is something more than exclusion from a particular job with a particular employer. *See Wernick v. Federal Reserve Bank of New York,* 91 F.3d 379 (2d Cir.1996) (providing that "[i]f a jury reasonably could have found that Wernick needed work environment modifications in order to perform *any* job, and that therefore she was disabled, it was error for the district court to hold that, as a matter of law, she was not disabled. If, however, the only reasonable conclusion a jury could have reached was that Wernick needed the accommodations solely to perform her *current* job, the district court correctly granted summary judgement in favor of [the defendant] on the ground that Wernick was not disabled, because, as we held in Heilweil, '[a]n impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one.' ") (emphasis added); *Heilweil v. Mt. Sinai Hospital,* 32 F.3d 718, 723 (2d Cir.1994) (stating that when determining whether a plaintiff's physical impairment substantially limits her ability to work, "the kinds of jobs from which

the impaired individual is disqualified must be carefully considered. An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one.") (citing *Jasany, supra*), *cert. denied,* 513 U.S. 1147, 115 S.Ct. 1095, 130 L.Ed.2d 1063 (1995); *id.* at 723-24 ("In *Daley v. Koch,* 892 F.2d 212, 215 (2d Cir.1989) we stated the obvious fact that a person found unsuitable for a particular position has not thereby demonstrated an impairment substantially limiting such person's major life activity of working. In fact, every circuit to visit this issue has so ruled.") (citing cases); *id.* at 724 (where plaintiff could not continue her work as blood bank administrator because her asthmatic condition was exacerbated by the facility's ventilation system, Court provides that "[n]othing suggests plaintiff's education and previous job experiences would hinder her ability to find a suitable position in the general field of administration."); *Daley v. Koch,* 892 F.2d 212, 214-15 (2d Cir.1989) (unsuccessful police department candidate suffering from "poor judgment, irresponsible behavior and poor impulse control" but no "particular psychological disease or disorder" was not disabled within the meaning of the ADA because he had failed to meet the "unique qualifications" of the job and because "[b]eing declared unsuitable for the *particular position* of police officer is not a substantial limitation of a major life activity.") (emphasis added); *id.* at 215 (also finding that plaintiff's "personality traits could be described as commonplace; they in no way rise to the level of an impairment.").

In *Redlich v. Albany Law School of Union University,* 899 F.Supp. 100, 107 (N.D.N.Y.1995), the Court considered that for purposes of the regulation defining substantial impairment in the major life activity of working, plaintiff's "*class*" of job was "that of law professor." *Id.* Surely, if a law professorship is a sufficiently broad "class" of jobs, so is the still broader "class" of jobs encompassed by "law practice"--plaintiff's chosen field.

When all is said and done, then, the cases and regulations discussed above confirm my conclusion that the practice of law is a sufficiently broad "class" of jobs for purposes of defining plaintiff's substantial limitation in the major life activity of working. Unlike the plaintiffs in *Forrisi* and *Jasany,* Dr. Bartlett has been impeded from participation in an entire field of employment---not just a particular job with a particular employer. Therefore, having concluded that the appropriate demographic group to which plaintiff should be compared is a group of individuals with similar background, skills, and abilities, I now move to the question whether when compared to this population, plaintiff is qualified for her position and whether she is substantially impaired in the major life activity of working.

2. *A Finding of Substantial Impairment*

As noted, an essential predicate to interpreting plaintiff's reading ability is the establishment of the criterion against which they will be measured. Plaintiff argues that the proper metric is comparison to people with educational achievement comparable to her own. She proposes using the average scores of college graduates as the appropriate proxy, because that is the highest educational level against which the Woodcock and the WRAT are normed. Were norms available for law school graduates or bar exam test-takers, she advocates those be used. I agree.

I take judicial notice of the fact that in 1993, 21.9% of the adult U.S. population had graduated from a four-year college. *See* Chart No. 238, Educational Attainment: 1960 to 1994, *Statistical Abstract of the United States* (1995). In 1994, less than one half of one percent of the adult population (861,000 out of 180 million) were lawyers. *Id.,* Chart No. 649, Employed Civilians, by Occupation.

Plaintiff maintains that her ability to take the Bar Examination must be measured against this standard and that for the reasons set forth by her experts, she is significantly disabled because she cannot read in the same condition, manner, or duration as other law students. I agree with plaintiff and her experts that plaintiff cannot and does not read like the average law student. As a practical matter, I concur with Dr. Hagin that an average law school graduate reads significantly faster than the 4th percentile of a college student score on the DRT and with substantially greater automaticity.[23] For this reason, and applying the standards articulated above, I conclude that plaintiff has proven by a preponderance of the evidence that she is substantially impaired in the major life activity of working and thereby is a disabled individual, as that term is understood both under the ADA and Section 504.

E. *Qualified for the Job*

Now that the Court has determined that the practice of law is the relevant category of jobs from which plaintiff has been excluded because of her substantial impairment, and that plaintiff is "substantially limited" in this major life activity of working, it remains to be discussed whether plaintiff is qualified to perform the job. *See Borkowski v. Valley Central School District,* 63 F.3d 131, 137-38 (2d Cir.1995) (providing that "plaintiff bears the burden of proving either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions.").

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[23]*See* Dr. Hagin's description of plaintiff's abilities as compared with college freshmen, Conclusions of Fact, II, B.3, *supra.*

This Court is cognizant of the fear of many legislators, judges, and scholars, that opening the door for disabled Americans to enter professions of their choice could lead to absurd results such as the first baseman with the bad elbow suing for damages or an accommodation under the ADA. This argument was cogently rebuked by the *Black* Court. I quote the *Black* Court's discussion on this point in full:

> The Administrative Law Judge was concerned that focusing on particular jobs or particular fields rather than on employability in general would lead to anomalous results.
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> ... To illustrate: a person may have as his life's dream employment as a running back with the Dallas Cowboys. He may be denied this employment solely on the basis of his inability to run 100-yards in 10 seconds or less. This person would then have an "impairment" (condition lessening physical ability) which actually prevented his obtaining particular, desired employment. Yet this person would not be considered "handicapped" within the meaning of the statutory definition since this particular impairment is not likely to impact adversely on his employability (since few jobs require this particular talent). The same point could be illustrated by a concert pianist with too-short fingers, or a 5'5 basketball star. These individuals have conditions which may actually affect their ability to obtain a particular job. But they are not "handicapped" within the meaning of the statutory definition because their respective impairments are not likely to affect their employability generally, measured against the full spectrum of possible employments.
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> Administrative Law Judge's Decision, at 12. The Judge's concerns are misplaced. It is true that the

> individuals he discusses would not be protected by the Act, but the reason is not because their impairment did not substantially limit employability. The individuals he discusses are not "capable of performing a particular job" and hence are not "qualified handicapped individuals" within the meaning of 60 C.F.R. § 60-741.2. An individual who is 5'5 is not capable of performing the job of center on the New York Knicks. An individual with extremely short fingers is not capable of performing the job of concert pianist. An individual who runs the 100 in 27 seconds is not capable of performing the job as running back for the Dallas Cowboys. Thus, what appears to be a major rationale for the definition adopted by the Administrative Law Judge disappears.
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> *Black*, 497 F.Supp. at 1100.

While largely approving of the *Black* rationale (calling *Black* "the most comprehensive examination by a court to date of the ... definition of 'handicapped' "), the Court in *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir.1985)--also cited by the EEOC--opined that *Black* "did not adequately analyze the focus and relationship of the definitional elements of the statute---impairment, substantial limitation of a major life activity, and qualified person." *Jasany*, 755 F.2d at 1249. The Court wrote:

> The *Black* Court was right in rejecting the ALJ's illustrations of people incapable of playing professional sports, but for the wrong reason. Characteristics such as average height or strength that render an individual incapable of performing particular jobs are not covered by the statute because they are not impairments. The distinction can be an important one. The burden is on the plaintiff to establish the existence of an impairment that substantially limits a major life

> activity as an element of the plaintiff's prima facie case. Once a prima facie case has been presented, the burden shifts to the defendant employer to demonstrate that challenged criteria are job related and required by business necessity, and that reasonable accommodation is not possible.

Id.; see also id. at 1250 n. 5 (noting the purported "error in the professional athlete hypotheticals" by stating that "those individuals probably could not show that they were qualified for the position in question even apart from their 'handicap.' ").

Despite the fact that the two courts disagree on the approach to identifying when a disabled person is entitled to accommodations, their views are not mutually exclusive. I simply view the two cases as alternative holdings under the ADA. Hence, the most important thing to be gleaned from the *Black* and *Jasany* Courts' discussion is that two separate grounds under the law exist to dispel the specter of an individual being able to bring suit alleging that his or her rights were violated because he or she was unable to secure a specialized position like that of a Yankees first baseman. First, using the *Black* analysis, the individual would not be considered a "qualified individual" for the position: his or her inability to throw and catch exceptionally well would disqualify him or her from the requirements of the job. Second, under the *Jasany* analysis, the individual's poor throwing ability (or other "average" limitations) would not be deemed an "impairment" under the law, so a prima facie case of disability discrimination could never be made. These two legal protections are routinely invoked in accommodations cases. Numerous decisions are based on the fact that an individual's impairment, unfortunately for the individual, goes directly to a necessary function of the job--as with the pilot of a commercial airline whose vision does not permit him or her to see clearly enough to pass safety standards. *See* 29 C.F.R. Pt. 1630, App. Section 1630.2(j).

Hence, with these standards in mind, it is clear that courts should consider two essential questions in evaluating a plaintiff's career choice---has the plaintiff demonstrated that he or she is qualified to perform the job at issue and, if so, does he or she have a substantial impairment in performing that job. Having already found that Dr. Bartlett is substantially impaired in the major life activity of working, I now turn to the question of whether she is otherwise qualified to perform as a legal practitioner.

There is no insinuation, and I cannot find, that Dr. Bartlett is incapable of performing the functions of a practicing lawyer. She practiced as a law clerk in a law firm before she was terminated due to her inability to pass the bar examination. Through self-accommodation and other accommodations from a reasonable employer, plaintiff is and will be perfectly capable of fulfilling the essential functions of lawyering. Moreover, speed in reading is not tested by the bar examination, nor is speed in reading one of the essential functions of lawyering. *See,* Part F, *infra,* (noting that speed and visual ability to read are not what is tested by the bar examination, nor what are required of practicing attorneys). Therefore, while it is undoubtedly true that not every person is physically able to be a Yankees first baseman, it is likewise true that it would be grossly unfair to impede whole classes of individuals like plaintiff, with plaintiff's automaticity and reading rate disabilities, from participating in entire classes of customary professions such as the practice of law because they can not read a professional examination like average law school (or other professional school) graduates. This was unquestionably the reasoning of the *Black* and *Jasany* courts, and that reasoning was implicitly sanctioned by the EEOC's citation to the cases in its Interpretive Guidance of the regulations. *See* 29 C.F.R. Pt. 1630, App. Section 1630.2(j) (citing *Forrisi v. Bowen,* 794 F.2d 931 (4th Cir.1986); *Jasany v. U.S. Postal Service,* 755 F.2d 1244 (6th

Cir.1985); *E.E. Black, Ltd. v. Marshall,* 497 F.Supp. 1088 (D.Hawai'i 1980)).

F. *Proof of Discrimination under the ADA and Section 504*

To establish liability under the ADA and Section 504, plaintiff must prove by a preponderance of the evidence that she was a qualified person with a disability and that "by reason of such disability," she was "excluded from participation or denied the benefits of the services, programs, or activities of a public entity, or [was] subjected to discrimination by any such entity." 42 U.S.C. § 12132. Alternatively, plaintiff can establish defendants' liability by a preponderance of the evidence under Title III of the ADA. Although Title III generally applies only to private entities, the examination provision has unanimously been held to apply to public entities, and specifically to state bar examinations, including New York's. *See, e.g., Argen,* 860 F.Supp. at 87; *Pazer,* 849 F.Supp. at 286-87; *D'Amico v. New York State Bd. of Law Exam'rs,* 813 F.Supp. 217, 221 (W.D.N.Y.1993); *In re Petition of Rubenstein,* 637 A.2d 1131, 1136-37 (Del.1994) (noting that "in the interpretive analysis of its Title III regulations, the United States Department of Justice has taken the position that '[e]xaminations covered by this section would include a bar exam.' ") (citing ADA Handbook, III-100, Oct. 1991.). This is so because "person" is defined generally in the ADA to cover public entities. *See* 42 U.S.C. § 12111(7).

Specifically referring to licensing procedures such as the bar examination at issue here, Title III states that:

> Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons

with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. § 12189.

The relevant implementing regulation promulgated by the Department of Justice under Title III states that:

> [A]n examination covered by this section must assure that (i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).

28 C.F.R. § 36.309(b)(1)(i).

For comparison, the EEOC-promulgated regulations under Title I pertaining to the administration of tests for employment provides:[24]

> It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or

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[24] I have previously determined that the regulations promulgated by the EEOC pursuant to Title I are useful in elucidating the appropriate standards under the ADA. *See* Part I, *supra*.

> whatever other factors of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

29 C.F.R. § 1630.11. The EEOC's Interpretive Guidance on this provision further elucidates the agency's thinking in promulgating the regulation and provides a useful analytical approach for this Court:

> The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking sills in formats that do not require the use of the impaired skill.
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> . . . . .
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> Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he [or she] is disabled with dyslexia, and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual.
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> . . . . .

> Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter.... An employer may also be required, as a reasonable accommodation, to allow more time to complete the test.

29 C.F.R. Pt. 1630, App. Section 1630.11. The only exception to the rather stringent and straightforward requirements articulated above is the EEOC's reminder that "[t]his provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills." *Id.* Specifically referring to dyslexics, the EEOC wrote:

> Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within an established time frame if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

Id. The question, then, of course, is whether the bar examination is a test intended to measure the applicants' ability to read or ability to perform under specific time constraints, and, necessarily, whether those abilities are "essential functions" of being a lawyer. For several reasons, I find that this is not the purpose of the bar examination and that these are not "essential functions" of being a lawyer as determined by the examination.

First, the notion that the bar examination is intended to be a reading test is most strongly belied by the fact that numerous accommodations, including time extensions, are granted every year to persons whose physical impairments make it difficult visually to read, including persons who are blind. If the bar examination were intended to test a person's visual ability to read or a person's ability to perform under time pressure, there would be no blind attorneys. Thankfully, this is very far from the reality of modern law practice. Given that defendants admit that they grant accommodations to persons with various types of disabilities, they are estopped from arguing that the bar examination is intended to test either reading or the ability to perform tasks under time constraints.

Second, I find that even if this were the purpose of the bar examination--which it certainly is not, as revealed by defendants' very practice of granting accommodations in numerous cases--the visual ability to read and the ability to perform tests under time constraints are not "essential functions" of a lawyer. In fact, at least one of my colleagues, on the District of Columbia Circuit Court of Appeals, does not have the visual ability to read. He reads braille instead, and uses the services of a reader and a dictaphone. This is but one powerful example of an attorney with an impairment who has been able to practice law. Clearly, being able to see and quickly comprehend visual images on a page is not "essential" to the practice of law.

The Board may be within its rights to declare that extra time would impair the integrity of the bar examination, provided it can demonstrate that the ability to perform legal tasks under the bar examination's time constraints is essential to minimal competence in the practice of law, and that the bar examination actually intends to test this skill. *See Southeastern Community College v. Davis,* 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) (holding that a nursing program need not adjust its training procedures to accommodate a person who, because of

her disability, could not serve the nursing profession "in all customary ways"). Although "reading, thinking, and writing under time constraints are important skills of a competent lawyer," (Swain Aff. p 7), Taylor Swain, a member of the Board, conceded that the bar examination is not a "speeded" test--it is not intended and does not measure the ability of applicants to answer questions within time constraints. Instead, the Examiners presume that adequate time exists for the average person to answer the questions posed. (*See* Tr. at 1661 ("under normal circumstances, most normal candidates have sufficient time to complete the examination"); Tr. at 1666 (the Board has never done a study to measure reading rate necessary to take examination).)

Because I find that plaintiff is disabled and that she was denied reasonable accommodations in taking the bar examination even though she was otherwise qualified, I must find that her rights under the ADA and under Section 504 were violated. *See D'Amico,* 813 F.Supp. at 221 ("[T]o succeed on a claim under the ADA, plaintiff must show (1) that she is disabled, (2) that her requests for accommodations are reasonable, and (3) that those requests have been denied."). Although defendants try to escape this liability by shrouding themselves under the banner of the Eleventh Amendment and hiding behind the expert opinion of their consultant, Dr. Vellutino, I cannot excuse them from their obvious liability in this case.

In essence, defendants attempt a burden shifting defense: that they are, as state actors, entitled to special deference in their policy determinations with regard to disabilities and its application to specific applicants. They also claim that because they make their determinations based on an expert's opinion, they are entitled to deference in their judgment that an applicant should not be accommodated. (Tr. at 2168.) I disagree. The ADA makes no distinctions regarding the burdens of proof allocated to covered entities, and explicitly strips the states of their

Eleventh Amendment immunity. *See* 42 U.S.C. § 12202. No court has accorded a state entity such deference, although several courts have deferred to academic institutions in their judgments as to assessing whether disabled students are "otherwise qualified" and to the sculpting of "reasonable accommodations." *See, e.g., Doe v. New York Univ.*, 666 F.2d 761, 776 (2d Cir.1981); *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir.1991). Clearly, deference is due a state in determining the qualifications an individual needs to practice law in that state. *See also Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474, 477 (7th Cir.1974) ("Admission to practice in a state and before its courts is primarily a matter of state concern. And the determination of which individuals have the requisite knowledge and skill to practice may properly be committed to a body such as the Illinois Board of Law Examiners. A federal court is not justified in interfering with this determination unless there is proof that it was predicated upon a constitutionally impermissible reason.") (citations omitted). *But cf. Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957) ("A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.").

The issue here, however, is different: Are defendants improperly identifying learning or reading disabled applicants? On this question, no deference is due because no deference is due to the Board's or expert's determinations of what defines a learning disabled applicant. This is an issue of fact for the trier of fact, and as previously stated, I find that plaintiff has shown by a preponderance of the evidence that she is disabled under the law.

II. PLAINTIFF'S EQUAL PROTECTION CLAIM

A. *The Appropriate Standard of Review*

At least until the passage of the ADA in 1990,[25] it was clear that the rational basis standard was the appropriate standard of review under the Equal Protection Clause for reviewing purported instances of discrimination against handicapped individuals. In *City of Cleburne v. Texas, Cleburne Living Center, Inc.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 3257-58, 87 L.Ed.2d 313 (1985), the Supreme Court wrote that "absent controlling congressional direction," the Court would "devise[ ] standards for determining the validity of ... official action that is challenged as denying equal protection." *Id.* at 439-40, 105 S.Ct. at 3254. After considering whether and how certain

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[25] Although the ADA was passed in 1990, its effective date was not until January 26, 1992. *See* 42 U.S.C.A. § 12181. Therefore, many courts who reviewed legislation or action disadvantaging the handicapped after 1990 did not address the question of the statute's effect on the level of review because the cases before them were filed before the effective date of the statute. *See, e.g., Duc Van Le v. Ibarra*, 1992 WL 77908, *9 (Colo.1992) (en banc) (declining to apply strict scrutiny to disabled in part because the ADA "is not applicable here because this case was not brought under that Act and that Act was not in effect at the time of trial."), *cert. denied*, 510 U.S. 1085, 114 S.Ct. 918, 127 L.Ed.2d 207 (1994); *Tomsha v. City of Colorado Springs*, 856 P.2d 13, 14 (Colo.Ct.App.1992) (rejecting claimant's strict scrutiny argument because the ADA "is applicable here because claimant was injured before its effective date."); *see also Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993) ("Even if respondent were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which ... does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.").

groups have come to receive heightened review under the Equal Protection Clause, the Court in the end concluded:

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect ... it would be difficult to find a principled way to distinguish a variety of other groups who perhaps have immutable disabilities setting them off from others, who themselves cannot mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the *disabled*, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Id. at 445-46, 105 S.Ct. at 3257-58 (emphasis added).

Congress' passage of the ADA in 1990 cast some doubt[26] on this holding to the extent that in the congressional findings accompanying the Act, Congress intimated that the disabled should be deemed a suspect class for purposes of equal protection review. Invoking the classic language attributed to "suspect" classes in constitutional jurisprudence, *see United States*

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[26]For excellent discussions of the issue, *see* Lisa A. Montanaro, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 Pace L.Rev. 621 (1995); Amy S. Lowndes, Note, *The Americans with Disabilities Act of 1990: A Congressional Mandate For Heightened Judicial Protection of Disabled Persons*, 44 Fla. L.Rev. 417 (1992); *see also* James B. Miller, Note and Comment, *The Disabled, the ADA & Strict Scrutiny*, 6 St. Thomas L.Rev. 393 (1994); Neil D. O'Toole, *The ADA: Strict Scrutiny Protection for Disabled Workers*, 21 Colo. Law. 733 (1992); William H. Pauley III, *The Americans Disabilities Act of 1990: Cases of First Impression*, 455 PLI/Lit 403 (1993); Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 Willamette L.Rev. 1 (1997).

v. Carolene Prods., 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938), the Congress wrote:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

42 U.S.C.A. § 12101(a)(7) (reporting Congress' various findings under the statute). Several questions arise from Congress' invocation of this language. It is unclear what Congress attempted to effect by this language--whether Congress intended to force the courts to subject legislation or behavior respecting disabled persons to strict scrutiny review or whether the Congress merely desired to send a message to the courts that a heightened level of review of the claims of disabled individuals was appropriate.

Predictably, the ambiguity within the Act has generated an ensuing confusion in the nation's courts regarding what level of review should be afforded the disabled in light of the ADA's findings. Numerous courts have held that the rational basis test remains the appropriate standard for reviewing discrimination claims brought by the handicapped. *See, e.g., Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia,* 6 F.3d 990, 1001 (3d Cir.1993) (in affirmative action context, court holds that there was "no evidence that the ADA overruled *Cleburne,* and the limited case law is to the contrary. Moreover, we believe application of heightened scrutiny to the preference for handicapped business owners would run counter to the ADA, which Congress enacted to reduce discrimination against

handicapped persons."); *Duc Van Le v. Ibarra*, 1992 WL 77908, *9 (Colo.1992) (en banc) (after finding the ADA inapplicable because the case was not brought until after the Act's effective date, holding that "[t]o declare the mentally ill to be a suspect or quasi-suspect class would be contrary to previous decisions of the United States Supreme Court that have interpreted the Equal Protection Clause of the United States Constitution."), *cert. denied*, 510 U.S. 1085, 114 S.Ct. 918, 127 L.Ed.2d 207 (1994). Other courts, taking at least the spirit of the legislation to heart in interpreting the federal Equal Protection Clause and other state and federal laws, have concluded that a higher level of review should be given to handicapped persons. *See, e.g., Martin v. Voinovich*, 840 F.Supp. 1175, 1208-10 (S.D.Ohio 1993) (applying intermediate scrutiny to disabled in light of ADA); *Trautz v. Weisman*, 819 F.Supp. 282 (S.D.N.Y.1993) (discussing the "revolution" resulting from the passage of the ADA and concluding in the context of a § 1985(3) prosecution that "[w]hile [the ADA] may not provide heightened scrutiny for discrimination against individuals with disabilities under the equal protection clause, it is relevant to Congress' interpretation of § 1985(3)."); *People v. Green*, 148 Misc.2d 666, 561 N.Y.S.2d 130, 132-33 (N.Y.Co.Ct.1990) (discussing the ADA's purposes generally and finding that hearing impaired jurors should not be excluded from juries in part because "[d]isabled persons in general ... may constitute a 'suspect classification' " under New York's constitution;). Finally, many courts have applied the rational basis standard without discussing whether the passage of the ADA has changed or should change their thinking on the subject. *See, e.g., Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 824-27 (2d Cir.1996) (applying rational basis standard to claims of handicapped individuals who challenged state's denial of funding), *cert. denied*, --- U.S. ----, 117 S.Ct. 1843, 137 L.Ed.2d 1047 (1997); *Story v. Green*, 978 F.2d 60, 64 (2d Cir.1992) (noting "in passing that most authorities have not considered disability to be a suspect or quasi-suspect classification";

providing no discussion of the ADA); *More v. Farrier,* 984 F.2d 269 (8th Cir.) (applying rational basis test without discussion), *cert. denied,* 510 U.S. 819, 114 S.Ct. 74, 126 L.Ed.2d 43 (1993). With no clear answer emanating from case precedent, I move to an analysis of Congress' intent in passing the ADA and whether Congressional legislation should alter Supreme Court precedent. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

1. *The Congress' Intent in Passing the ADA*

It is not entirely clear what the Congress intended by describing the disabled in its findings in a manner that would suggest that the group be deemed a suspect class. There does not appear to be any direct legislative history on the question. However, a comparison of the ADA's findings with another statute, the Religious Freedom Restoration Act ("RFRA"), suggests that Congress was probably not intending the ADA to change directly the level of review afforded disabled persons under the Equal Protection Clause. This conclusion can be gleaned from the difference between the two statutes. In RFRA, Congress expressly declared the level of review it believed should be afforded legislation impacting religious freedoms. *See* 42 U.S.C. § 2000bb(a)-(b) (stating that "governments should not substantially burden religious exercise without compelling justification" and that one of the purposes of RFRA was "to restore the compelling interest test ... and to guarantee its application in all cases where free exercise of religion is substantially burdened."). In contrast, the ADA does not expressly state that courts should employ either a strict scrutiny or even a quasi-strict (or "intermediate") level of review. *See* 42 U.S.C.A. § 12101(a)(7). Rather, Congress appears to be utilizing its recognizably superior fact-finding function, provid-

ing to the Court data from which it hopes the Court will arrive at the conclusion that disabled persons should be given heightened scrutiny under the Equal Protection Clause. Pronouncing a finding of fact, and couching it in such factual, not legal, terms, Congress likely intended the ADA to be a springing board from which the courts might themselves develop a stricter level of scrutiny for legislation or action impacting the disabled.

2. *The Congress' § 5 Power*

Congress' power to legislate changes in the level of the Court's scrutiny under the Equal Protection Clause is the source of some ambiguity in the law, resulting most noticeably in a difficulty in line-drawing[27] between what Congress can and can not do with its constitutionally-derived power to "enforce [the Fourteenth Amendment] by appropriate legislation." U.S. Const. amend. xiv.[28] Once again, a consideration of the legal fate of RFRA is instructive on the ADA's meaning and impact in this context.

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[27]*See City of Boerne v. P.F. Flores,* --- U.S. ----, ----, 117 S.Ct. 2157, 2164, 138 L.Ed.2d 624(1997) (admitting that "the line between [Congressional] measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern.... There must be a congruence or proportionality between the injury to be prevented or remedied and the means adopted to that end.").

[28]For elucidating discussions of Congress' power under § 5, *see* Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment,* 141 U. Pa. L.Rev. 1029 (1993); Stephen L. Carter, *The Morgan Power and the Forced Reconsideration of Constitutional Decisions,* 53 U. Chi. L.Rev. 819 (1986). *See generally, Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) (establishing that Congress' Section Five power permitted Congress to find an equal protection violation where the Supreme Court had not).

The Supreme Court's recent invalidation of RFRA in *City of Boerne v. P.F. Flores,* --- U.S. ----, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) suggests an answer to the question whether Congress has the authority under § 5 of the Fourteenth Amendment to declare what level of scrutiny should be employed in equal protection cases. Although *Boerne* involved religious liberty and the Due Process, not the Equal Protection, Clause of the Fourteenth Amendment, the Supreme Court's holding that Congress does not have the power to declare substantive protections, but only has the power to enforce them, is easily applicable to the instant question, particularly given that Congress' § 5 power is the same under both clauses.

In *Boerne,* the Supreme Court reiterated their prior holding that "as broad as the congressional enforcement power is, it is not unlimited." *Boerne,* --- U.S. at ----, 117 S.Ct. at 2163 (citing *Oregon v. Mitchell,* 400 U.S. 112, 128, 91 S.Ct. 260, 266-67, 27 L.Ed.2d 272 (1970) (Black, J.)). The Court stated that "[t]he design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* at ----, 117 S.Ct. at 2164. Simply put, the Court explained that "Congress does not enforce a constitutional duty by changing what the right is." *Id.* Hence, at the very least, *Boerne* tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection Clause. What remains to be seen, however, is what will be done with Congress' fact-driven suggestion in the ADA that the courts themselves change the level of scrutiny afforded handicapped persons. For the reasons to be discussed, in the end, the question must be left for the Supreme Court to decide.

3. *Authority of this Court to Decide the Question*

Recently, the Supreme Court reaffirmed the notion in *Agostini v. Felton,* --- U.S. ----, 117 S.Ct. 1997, 138 L.Ed.2d

391 (1997) that when a lower court is presented with a situation to which Supreme Court precedent has "direct application," the lower court should refrain from deciding the case inconsistently with prior precedent, and should leave to the Supreme Court "the prerogative of overruling its own decisions." *Id.* at ----, 117 S.Ct. at 2017 (quoting *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)); *see also Ellis v. District of Columbia,* 84 F.3d 1413, 1418 (D.C.Cir.1996) (applying *Rodriguez* rule); *Distribuidora Dimsa S.A. v. Linea Aerea Del Cobre S.A.,* 768 F.Supp. 74, 77 (S.D.N.Y.1991) (providing that "[a] district court has no authority to reject a doctrine developed by a higher court unless subsequent events make it 'almost certain that the higher court would repudiate the doctrine if given a chance to do so.' "). I find that the *Cleburne* case has direct application here, and that fact constrains my ability to determine whether the ADA has, or should, effect a change in the level of scrutiny afforded the disabled. Such a question must be brought to this nation's highest Court to decide.

B. *The Legal Standard*

Having concluded that this Court should apply the traditional rational basis standard to claims brought by the disabled, as determined by the Supreme Court in *Cleburne,* "[t]he fundamental principles governing equal protection are well established." *United States v. Yonkers,* 96 F.3d 600, 611 (2d Cir.1996). "A plaintiff is required to show not only that the state action complained of had a disproportionate or discriminatory impact but also that the action was taken with intent to discriminate." *Id; see also E & T Realty v. Strickland,* 830 F.2d 1107, 1114 (11th Cir.1987) (providing that "[m]ere error or mistake in judgment when applying a facially neutral statute does not violate the equal protection clause. There must be intentional discrimination."), *cert. denied,* 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). The Second Circuit has recently held that

"[i]t is elemental that 'disparate treatment is not necessarily a denial of the equal protection guaranteed by the Constitution'; rather, the Supreme Court has afforded 'wide discretion ... to the states in establishing acceptable classifications.' " *Suffolk Parents of Handicapped Adults v. Wingate,* 101 F.3d 818, 824-25 (2d Cir.1996). The Court has steadfastly held that states "must have substantial latitude to establish classifications that roughly approximate the nature of the problems perceived, that accommodate competing concerns for both public and private, and that account for limitations on the practical ability of the State to remedy every ill." *Id.* "The general rule, therefore, is that 'state legislation or other official action that is challenged as denying equal protection ... is presumed to be valid and will be sustained if the classification drawn ... is rationally related to a legitimate state interest.' " *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)). *See also Ricketts v. City of Hartford,* 74 F.3d 1397, 1407 (2d Cir.) ("It is well established that a claimant under the Fourteenth Amendment's Equal Protection Clause ... must establish intentional discrimination.") (citing *McCleskey v. Kemp,* 481 U.S. 279, 292, 107 S.Ct. 1756, 1766-67, 95 L.Ed.2d 262 (1987)), *cert. denied,* --- U.S. ----, 117 S.Ct. 65, 136 L.Ed.2d 26 (1996); *Giano v. Senkowski,* 54 F.3d 1050, 1057 (2d Cir.1995) ("To prove an equal protection violation, claimants must prove purposeful discrimination.").

C. *Application to Plaintiff's Case*

While plaintiff has established the presence of a number of troubling facts, such as the fact that for the years at issue, applicants claiming a learning disability were approximately 3.5 times more likely to be denied accommodations than those claiming other types of disabilities, I cannot find that plaintiff has demonstrated that any such effect was intentional or that the Board's underlying purpose was irrational. In the Board's defense, physical disabilities may be more susceptible to

scientific testing, and the "chaos" in the learning disability field creates less exactitude in identifying a reading disability. *Cf., Heller v. Doe,* 509 U.S. 312, 321, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (upholding under the rational basis standard a Kentucky statute under which "the applicable burden of proof in mental retardation commitment proceedings is clear and convincing evidence while the standard in mental illness proceedings is beyond a reasonable doubt" in part because "mental retardation is easier to diagnose than is mental illness.") Therefore, despite my concerns about the Board's practices, I find that the Board's procedures, including the subjection of applicants' reports to review by an expert, are rationally related to the legitimate government end of discerning whom should be afforded accommodations on the state bar examination.

However, I must note that the perception of bias generated by the disparate effect noted above is exacerbated by the suspicion with which the Board views learning disabled applicants. Of great concern to this Court were reports by two reputable witnesses of direct bias comments by Fuller, Executive Secretary of the Board. (*See* Duchossoi Aff. pp 6, 7, and 8 (Learning Services Program Coordinator at New York University alleges Fuller told her he had 1) "to confess to a certain cynicism as to the existence of learning disabilities to begin with"; and 2) "anyone who has the money can pay for a report [concerning a learning disability]" and "too many times I see testing reports that I really doubt are legitimate"; and 3) "You have to realize that the law is a learned profession and I am not sure that a person with a learning disability should aspire to such a goal."); Rosenthal Aff. p 24 (a learning disabled applicant initially denied accommodations by the Board, now a licensed lawyer, claims Fuller told her that it was "his job to protect the public from incompetent and incapable lawyers" and the public would be "unaware that they would be purchasing a defective product in the case of learning disabilities.").)

Much of the Board's bias appears to arise from its presumption that giving extra time to applicants with learning disabilities or impairments gives them an unfair advantage over other applicants. Fuller testified that he believed the Bar Examination's ability to certify the minimal competence of applicants was impaired when the examination was taken with extra time. (Tr. at 912.) Similarly, Taylor Swain, a Board member, testified at trial that psychometric principles taught that giving extra time to some applicants compromised the results of the test because the test would not be measuring the same factors. (Tr. at 1676-77.)

I am also concerned that Board members have not taken the time to familiarize themselves with the qualifications of its experts or the criticisms that exist against Vellutino's school of thought in the field. (Tr. at 1682-83 (The Board has delegated to Fuller responsibility to find experts and to ensure that Fletcher and Vellutino are "respected and noted experts in the field." She has had no direct contact with anyone other than Vellutino.); Tr. at 974, 979 (until recently, Fuller had interviewed no one other than Dr. Vellutino to advise the Board on learning disabilities. Current experts are recommended by Dr. Vellutino).) As discussed, there is no unanimity in the profession in how to define or identify a learning disability. *See generally* Tamar Lewin, *Fictitious Learning-Disabled Student is at Center of Lawsuit Against College*, N.Y. Times, April 8, 1997, at B9 (discussing the problems inherent in identifying learning disabled students and the bias against them which often ensues). By relying on one theory alone and by failing adequately to advise applicants of such reliance, the Board may be discriminating against applicants who qualify as learning disabled under the law.

Nevertheless, despite these suggestions of potential bias, I cannot find that plaintiff has proven that the Board *intentionally* discriminated against applicants with learning disabilities or

against plaintiff herself, particularly when the Board has come forward with "rational" explanations for its procedures. Dr. Vellutino is a respected research scientist in the field of children's learning disabilities. As noted, however, the field of learning disabilities is replete with chaos. Dr. Vellutino's theories, while not in the mainstream of the learning disability diagnostic community, are at the very least rational, particularly when it comes to determining whether an applicant is substantially disabled as compared to an average person. Dr. Vellutino and the Board simply did not recognize that the proper measure of comparison is not to an average population, but rather is to an average person performing the task at issue, *i.e.*, the average law school graduate reading on a test like the bar examination.

Finally, even plaintiff's own experts in their evaluations did not address or identify plaintiff's reading problem with clarity. Dr. Massad did not even mention plaintiff's automaticity problem in the report he sent to the Board. Neither Dr. Massad nor Dr. Hagin addressed plaintiff's reading rate problem in their reports. Dr. Hagin did not provide the comparison data concerning plaintiff's reading rate on the DRT until requested to do so by the Court. Clearly, under these circumstances, it is not irrational for the Board to use an expert to assist in the evaluation of such clinicians' reports. Likewise, the choice of Dr. Vellutino as that expert was perfectly rational, as were Dr. Vellutino's theories. Plaintiff's equal protection claim is therefore denied.

III. PLAINTIFF'S DUE PROCESS CLAIM[29]

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[29]Defendant asserts that "[p]laintiff never alleged a due process claim in her complaint and never included one in the PTO and concludes from this that it is improper at this late date to add a new claim." (Def. Post-Trial Brief at 107). While defendant concedes that "[p]laintiff's claims now raised as due process violations, were previously raised as equal protection violations in the Pre-Trial Memorandum of Law," (*id.*) the defendant urges this Court

A. *Constitutional Underpinnings*

It is axiomatic that "[a]dmission to practice [law] in a state and before its courts is primarily a matter of state concern [and that] the determination of which individuals have the requisite knowledge and skill to practice may properly be committed to a body such as the [ ] Board of Law Examiners." *Whitfield v. Illinois Board of Law Examiners,* 504 F.2d 474, 477 (7th Cir.1974); *see also Newsome v. Dominique,* 455 F.Supp. 1373 (E.D.Mo.1978) (citing *Whitfield* and providing that "[a]llegations of arbitrary cutoff scores and retesting procedures are simply insufficient to justify this Court's intervention into matters entrusted to the Missouri Supreme Court."). However, it is equally axiomatic that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process ... Clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). Hence, while it is uncontroverted that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar," it must be remembered that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239, 77 S.Ct. at 756. In time-honored precedent, the Supreme Court has written that:

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not to consider the new claim "unless plaintiff makes an application to reopen the record and defendants are given an opportunity to respond to specific allegations." (*Id.* at 4 n. 1).

The Court will consider the due process argument, however, because the facts underlying the claim were clearly established at the time of trial and since then the question has been fully briefed by the parties.

> Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Id; see also id. at 246-47, 77 S.Ct. at 760-61 (holding that State violated due process where it denied plaintiff opportunity to sit for bar exam and thereby "qualify for the practice of law" where there was "no evidence in the record which rationally justifies a finding that [plaintiff] was morally unfit to practice law").

As will be discussed below, however, the instant case does not implicate a state's prerogative to establish criteria for admission to the bar. Rather, this case involves a state agency's purported violation of a federal statute. Nevertheless, before I proceed to a consideration of plaintiff's due process claim, I must determine as a threshold matter whether this Court has jurisdiction to hear plaintiff's arguments.

B. *Threshold Question: Jurisdiction over Due Process Claim*

As a threshold matter, it must be decided whether this Court has authority to hear the merits of plaintiff's due process claim. Defendants argue that under Second Circuit and Supreme Court precedent, this Court is prevented from reviewing the Board's determination or conduct under the due process clause. They cite precedent establishing that under the due process clause "[a] federal court's review of state administrative proceedings is limited to whether the state has provided adequate avenues of redress to review and correct arbitrary action." *FSK Drug Corp.*

v. Perales, 960 F.2d 6, 11 (2d Cir.1992) (providing that court lacked jurisdiction to hear due process claim where former Medicaid provider brought action against Commissioner of New York Department of Social Services to challenge denial of re-enrollment application without prior hearing). They emphasize that "[a] section 1983 action is not an appropriate vehicle to consider whether a state or local administrative determination was arbitrary or capricious." *Id.* (noting that "[t]his claim could have been, but was not, raised in a state court proceeding under [Article 78]."); *see also Alfaro Motors v. Ward*, 814 F.2d 883, 888 (2d Cir.1987) (same) (citing *Parratt v. Taylor*, 451 U.S. 527, 543-44, 101 S.Ct. 1908, 1916-17, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 534-36, 104 S.Ct. 3194, 3204-05, 82 L.Ed.2d 393 (1984)); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n. 9 (1st Cir.) ("Where a state has provided reasonable remedies to rectify a legal error by a local administrative body ... current authority indicates that due process has been provided, and that section 1983 is not a means for litigating the correctness of the state or local administrative decision in a federal forum."), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982); *but cf., id.* (providing that "[a] different situation may be presented in some instances, particularly in the realm of equal protection, involving gross abuse of power, invidious discrimination, or fundamentally unfair procedures.... Different considerations may also be present where recognized fundamental constitutional rights are abridged by official action or state regulation."). However, defendants' analysis on this issue is wholly cursory. Upon deeper exploration, it is clear that precedent dictates that this Court has jurisdiction over plaintiff's due process claim.

In *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880-81 (2d Cir.1996), the Second Circuit articulated the pragmatic considerations that underlie the rule that federal courts should not review depriva-

tions of due process which can be redressed in the form of an adequate state postdeprivation remedy:

> When a deprivation occurs because of a random, arbitrary act by a state employee, it is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under 'color of law,' is ... almost ... [invariably] beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation.... Furthermore, that an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is whether the state is in a position to provide for predeprivation process.

101 F.3d at 880 (citing *Hudson v. Palmer,* 468 U.S. at 532-33, 104 S.Ct. at 3203-04) (citations and internal quotation marks omitted).

The Supreme Court's lengthy discussion of the question in *Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) is instructive on the question of whether and when a federal due process claim will be preempted by the availability of an adequate state postdeprivation remedy. *Zinermon* involved a patient who was admitted to a state mental health facility pursuant to voluntary admission forms he signed while heavily medicated. The patient brought an action against the facility and other state defendants alleging that he was thereby deprived of his liberty without due process of law. The *Zinermon* Court held that regardless of whether the plaintiff had adequate postdeprivation tort remedies under state law, his allegations were sufficient to state a claim under the federal due process clause as well. Referring to the *Parratt* line of cases which decline review of alleged due process violations where

there is an adequate state remedy available, the Supreme Court rejected the cases' application to the situation before them and held that "[b]ecause petitioners had state authority to deprive persons of liberty, the Constitution imposed on them the State's concomitant duty to see that no deprivation occur without adequate procedural protections." *Id.* at 135, 110 S.Ct. at 980. The Court wrote:

> It may be permissible constitutionally for a State to have a statutory scheme like Florida's, which gives state officials broad power and little guidance in admitting mental patients. But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* and *Hudson* .... [Plaintiff's] suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws. [Plaintiff] is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.

Id. at 135-36, 110 S.Ct. at 988-89. The question for this Court, then, is whether the Board's unique policy of reviewing applications of purportedly learning disabled candidates was an established state procedure or instead a random, unauthorized act by state employees. I find here that plaintiff is challenging a state procedure, and not a random act by a state employee.

In *Zinermon*, the Court articulated three reasons that the case was not controlled by the *Parratt* line of cases. First, the Court stated that "petitioners cannot claim that the deprivation of [plaintiff's] liberty was unpredictable" because it "is hardly

unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent." *Id.* at 136, 110 S.Ct. at 989. The Court distinguished the situation in *Parratt* and *Hudson* by stating that in those cases, while it might be anticipated that losses would occur, it was unknown at precisely what point they could be expected. However, in *Zinermon,* the Court found that "[a]ny erroneous deprivation will occur, if at all, at a specific, predictable point in the admission process--when a patient is given admission forms to sign." *Id.* Such is the case with Dr. Bartlett's claim as well. The State can anticipate that if the Board is using arbitrary and capricious practices or procedures to determine who is eligible for accommodations on the state bar exam, such a deprivation of a liberty or property interest will occur at the particular stage in which the Board is reviewing applications for accommodations.

The second reason articulated by the Supreme Court in *Zinermon* is even more compelling and relevant to the present purposes. The Court persuasively distinguished *Parratt* and its progeny by explaining that a random act cannot be remedied by a pre-deprivation process, but a state policy generally can be corrected by a predeprivation process. *See id.* at 137-38, 110 S.Ct. at 989-90. In the instant case, predeprivation process is not impossible. Dr. Bartlett is not challenging the random, isolated action taken by a mere employee bent on a malicious purpose. Rather, she is challenging the stated policies and procedures of a State Board with virtually unreviewable authority to determine whether she receives the reasonable accommodations to which the ADA affords her.[30] There is

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[30]In *Dwyer v. Regan,* 777 F.2d 825 (2d Cir.1985), the Second Circuit articulated an important caveat to the Supreme Court's analysis in this context and explained that "[a]lthough the [Supreme] Court found crucial the inability of states to anticipate the actions of depriving employees, it nonetheless must have recognized that a state, as an incorporeal entity, can establish policy, take action, and anticipate events only through its officials

undoubtedly in this context a possibility for establishing adequate pre-deprivation process and procedure. In fact, it is clear that some pre-deprivation process and procedure is already in place.

Third and finally, the Supreme Court distinguished the *Parratt* line of cases by stating that where "[t]he State delegated to them the power and authority to effect the very deprivation complained of here ... and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement," "petitioners cannot characterize their conduct as 'unauthorized' in the sense the term is used in *Parratt* and *Hudson*." *Id.* at 138, 110 S.Ct. at 990. The Court wrote that "[i]n *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate ... the

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and employees." *Id.* at 832. The Court went on to hold that:

[W]here the depriving actions were taken by a high-ranking officialhaving final authority over the decision-making process, this Court has found that they were not random or unauthorized within the meaning of *Parratt*.

Id. The Court cited its prior opinion in *Burtnieks v. City of New York*, 716 F.2d 982 (2d Cir.1983) which involved the City's razing of an apartment building without giving its owner notice and an opportunity to be heard at a predemolition hearing. In that case, the Second Circuit rejected the City's arguments that because this was unlawful under City ordinances it could not have been expected by the state and held that "decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure." *Id.* at 988; *see also Patterson v. Coughlin*, 761 F.2d 886, 891-93 (2d Cir.1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986); *but cf. Hellenic*, 101 F.3d at 880-881 (not mentioning line of cases which establish that actions by high-ranking officials with final authority over decisionmaking process are not deemed random or unauthorized).

procedural safeguards required before deprivations occur." *Id.* Clearly, the instant defendants were likewise imbued with broad authority to determine and provide the legally required accommodations to persons meriting them under the ADA and/or the Rehabilitation Act. Like the defendants in *Zinermon*, then, they cannot look to the law for relief and attempt to characterize their actions as "unauthorized" actions by mere state employees. Rather, their broad authority to determine who is given accommodations on the state bar examination brings along with it a concomitant duty: the duty to see that such accommodations are not arbitrarily or capriciously withheld. *See also Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880-81 (2d Cir.1996) (distinguishing between due process claims that are based in "established state procedure" and due process claims premised on "random, unauthorized acts by state employees."); *Adams v. Chief of Security Operations*, 966 F.Supp. 210 (S.D.N.Y.1997) (holding that "[b]ecause the deprivation alleged in this case was allegedly neither random nor unauthorized and the defendants have not attempted to show that a predeprivation hearing was not possible or practicable, the availability of a postdeprivation state law remedy is not a sufficient basis to dismiss the complaint as a matter of law.").

For all of these reasons, I conclude that plaintiff has established this Court's jurisdiction to hear her due process claim.

C. *The Appropriate Focus of Plaintiff's Due Process Claim*

As alluded to above, it is crucial to note at the outset of the examination of plaintiff's claim that plaintiff is *not* challenging defendant's failure to admit her to the New York State Bar. Such a review of a particular applicant's denial of admission to the bar can only be reviewed by the United States Supreme Court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486, 103 S.Ct. 1303, 1316-17, 75 L.Ed.2d 206

(1983). Even where "the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar," the district court does not have jurisdiction to hear the claim because in such an instance "the District Court is in essence being called upon to review the state court decision" regarding the particular applicant. *Id.* at 482-83 n. 16, 103 S.Ct. at 1315 n. 16.

Establishing qualifications for the practice of law and applying those criteria to individual applicants is somewhat different, however, from the conduct and determination at issue in the instant case. Here, plaintiff was applying for an accommodation in the taking of the New York state bar examination, and her due process challenge attacks defendant's practice of determining whether applicants were learning disabled by using an allegedly arbitrary cutoff score on one particular testing measure. Hence plaintiff is not aggrieved by her denial of admission to the bar. Rather, she challenges the Board's failure to grant her the reasonable accommodations in the taking of the bar examination to which she was entitled under the ADA and Section 504. Given that this factual context differs in important ways from the situation confronted in the cases where state bar qualifications are reviewed under federal due process, *see, e.g., District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 486, 103 S.Ct. 1303, 1316-17, 75 L.Ed.2d 206 (1983) (providing that "United States District Courts ... have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case."), I will begin my analysis by addressing the Second Circuit's holding in *Charry v. Hall,* 709 F.2d 139 (2d Cir.1983).

In *Charry,* the Second Circuit addressed the question "whether the right to sit for an examination for admission to a

profession represents a constitutionally protectable property or liberty interest comparable to a license already granted to practice that profession." 709 F.2d at 144. The plaintiff in that action, a Ph.D. graduate from New York University's Human Relations and Social Policy Department, challenged a state agency's finding that this program was not an accredited psychology program and that the plaintiff therefore could not sit for the examination required of all individuals seeking admission to practice psychology with a license. In examining the question whether the plaintiff's due process challenge could survive, the Second Circuit stated that "[t]he right to take an examination is hardly the equivalent of the grant of the license for which it is taken; the applicant may fail the examination, in which event, unlike the successful licensee, he will not have any property interest entitled to due process protection." *Id.* Defendants in this action make much of this language. (*see, e.g.*, Def.'s Post-Trial Mem. at 109-10.) However, upon closer examination, it is clear that the Second Circuit's holding in *Charry* is inapposite for at least two reasons.

First, and most importantly, the Second Circuit in *Charry* found that even though "[t]he right to take an examination is hardly the equivalent of the grant of the license for which it is taken," *id.*, the "arbitrary rejection of an application made by a fully qualified candidate can work a serious injustice on the applicant, depriving him of even the opportunity to obtain the license." *Id.* With this in mind, the Court concluded that it was "persuaded that an applicant satisfying statutory prerequisites has a 'legitimate claim of entitlement' to take the examination for the professional status of psychologist." *Id.* (providing that "[s]ince the present complaint ... raises a federal due process issue, the district court erred in dismissing it for lack of subject matter jurisdiction."). Although the *Charry* Court in the end determined that plaintiff's procedural due process claim failed

under the *Mathews v. Eldridge* test,[31] it nonetheless unquestionably recognized that a due process interest was at stake.

Second, there is some question whether the *Charry* holding is even relevant to the instant plaintiff's claims. Here, plaintiff is not attempting to circumvent the Board's policy of requiring (with some certain exceptions) that only law school graduates from accredited schools sit for the bar examination. Plaintiff has no reason to challenge such a policy because she was a successful graduate from an accredited law school. Rather, plaintiff challenges the Board's purportedly arbitrary and capricious determination that she was not entitled to accommo-

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[31]The Court found that:

> In the present case the private interest, *i.e.*, the fight to take an examination, while important enough to be classified as a constitutionally protectible property interest, hardly approximates the importance of a vested property right such as a license itself.

709 F.2d at 145. The Court, while somewhat troubled by the Board's procedures, in the end concluded that sufficient process under *Mathews v. Eldridge* was afforded the plaintiff. The Court stated that "[t]he administrative review procedure provided by the state ... is extensive and appears to us reasonably calculated to uncover and correct errors committed in denying an applicant the right to sit for an examination." *Id.* at 145. Furthermore, in rejecting the plaintiff's suggestion that he was entitled to an evidentiary hearing, the Court held that:

> The possible occurrence of an error in one or two cases does not call for an expansion of the review system to add cumbersome and expensive evidentiary hearings with detailed findings, at least when the only property at stake is the right to sit for an examination. To do so would heap an excessive burden on the state in cases in which applications are denied. The Due Process Clause of the Fourteenth does not guarantee errorless administrative decisions. It assures only a procedure that is reasonably calculated to protect a person's property right. The review procedure here met that standard.

Id. at 146.

dation in taking the bar examination. Therefore, plaintiff is not invoking the somewhat constitutionally suspect "right to take an examination"; rather, she is seeking to enforce her statutory right as a disabled individual to receive the accommodations to which she is entitled under law. The question for this Court, then, is whether plaintiff was denied her statutorily-entitled accommodations in an arbitrary and capricious manner in violation of federal due process.

D. *Whether Statutory Violations Can Establish Due Process Claims*

There is no question that plaintiff was denied her rights under the ADA and Section 504 to have reasonable accommodations in the taking of the New York State Bar Examination. *See* Part I, *supra*. However, there is considerable question whether plaintiff can subsequently bootstrap this violation into a federal due process violation. Even if defendants arbitrarily and capriciously denied Dr. Bartlett the accommodations to which federal law entitled her, I cannot find that this rises to the level of either a substantive or procedural due process violation.

First, under a substantive due process analysis, Dr. Bartlett has not shown that the existence of statutorily-created right under the ADA and Section 504 is a sufficient liberty or property interest that qualifies as a "fundamental right" requiring protection under the due process clause. While *Charry* and *Schware* reveal that there may be a federally ensured liberty or property interest in the taking of a professional examination, as discussed above, that is not the interest at issue here. Rather, here plaintiff challenges the defendants' failure to grant her accommodations in the examination--not their refusal to allow her to take the examination itself. Hence, I do not find that this failure to uphold plaintiff's statutory rights under the ADA and Section 504 amounts to a sufficient liberty or property interest under the due process clause to give plaintiff a claim. *Cf.*,

Sutton v. Marianna School District A., 573 F.Supp. 159, 165 (E.D.Ark.1983) (providing that where plaintiff has a cause of action based on a state statute which provides her with "a full remedy ... consistent with Federal due process requirements," her federal constitutional rights are protected because "[t]o hold otherwise would be to provide a basis for bootstrapping every cause of action based on state law into a Section 1983 case.").

Under a procedural due process analysis, there might be a more cogent argument available to plaintiff, but it, too, must fail. While the federal statutes entitling her to accommodations may constitute a sufficient deprivation to entitle plaintiff to predeprivation procedures, I cannot find under these facts that plaintiff was denied such predeprivation protection. Applying the *Mathews v. Eldridge* analysis, *see* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976) (requiring that in considering procedural due process claims courts consider three factors: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."), I find that while it is unquestionably true that the Board's procedures resulted in an erroneous result at least in this case and while it may be said that their methodology borders on the arbitrary, it is sufficient procedure to satisfy the federal due process clause.

Furthermore, in effect, plaintiff seeks to alter the substantive rule employed by the Board, not the process due to her in that determination. She does not claim that the Board failed to give her notice or an opportunity to be heard; rather, she is disgruntled that the Board and its expert made the wrong conclusion about whether she was disabled and thereby deserv-

ing of accommodation. In effect, plaintiff is arguing that the substantive rule invoked by the expert and by the Board was arbitrary in that it used an arbitrary cutoff score that was applied in an uneven fashion.[32] Such a review of a substantive policy determination is beyond the jurisdiction or authority of the Court under a procedural due process analysis.

E. *Reservations About Defendants' Conduct*

Nevertheless, despite my holding that defendants' conduct does not rise to the level of a due process violation, I must pause to note some of the very disturbing findings that came to light in the course of this trial regarding defendants' policies and procedures.

As recognized by Dr. Vellutino, there is a serious measure of arbitrariness at play when learning disabled applicants are not advised of the criteria the Board is employing is assessing learning disabilities.[33] As previously discussed, Dr. Vellutino

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[32]Plaintiff alleges that "[t]he Board's procedure for complying with the ADA is constitutionally inadequate because: (a) it relies on a single measure or type of measure (decoding cut-off) to determine learning disabilities; (b) said cut-off is admittedly arbitrary; and (c) the Board applies its policy in such an arbitrary and capricious fashion as to create an environment which fosters disparate treatment." (Pl. Post-Trial Brief at 69). She asserts that defendant's determination of which applicants are disabled under the law and thereby entitled to accommodations on the bar exam "must be based on a qualitative functional analysis rather than an underinclusive statistical test which even if it were applied uniformly would still violate the law because it draws an arbitrary line in the sand and excludes otherwise qualified applicants." (*Id.*)

[33]The parties at trial did not present a survey of what law schools or other state bar examiners do in evaluating learning disability reports. Dr. Hagin recommended that schools or other entities like bar examiners evaluating a learning disability report simply accept the diagnosis of learning disability so long as the report is issued by a person trained or licensed to diagnose such disabilities and the report covers the four standard areas of information

gives the benefit of the doubt to, and recommends accommodations for, any applicant who reports a word attack or word identification score at or below 30%, whether or not other scores

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upon which psychologists rely in rendering a learning disability. (Tr. at 559-600, 562, 586-87.) Those four areas include information concerning the applicant's history, cognitive development, educational ability and reading sub-skills. (Tr. at 1587.) According to Dr. Hagin licensed, clinical or school psychologists are competent to diagnosis learning disabilities. (Tr. 562.) There is evidence in the record, however, that at least two law schools, the University of California Hastings College of the Law and the University of Houston Law Center, defines the criteria they use in determining whether a learning disability exists:

> The four criteria necessary to establish a student's eligibility for learning disability adjustments or accommodations are: (1) average or above average intelligence as measured by a standardized intelligence test which includes assessment of verbal and non-verbal abilities; (2) the presence of a cognitive-achievement discrepancy or an intra-cognitive discrepancy indicated by a score on a standardized test of achievement which is 1.5 standard deviations or more below the level corresponding to a student's sub-scale or full-scale IQ; (3) the presence of disorders in cognitive or sensory processing such as those related to memory, language, or attention; and (4) an absence of other primary causal factors leading to achievement below expectations such as visual or auditory disabilities, emotional or behavioral disorders, a lack opportunity to learn due to cultural or socio-economic circumstances, or deficiencies in intellectual ability,

(Pl.'s 181 at 53, 169.) These criteria are closely akin to those used by Dr. Hagin. This law schools, like Dr. Hagin recommended, also require a report to be prepared by a "professional qualified to diagnose a learning disability, including but not limited to a licensed physician, learning disability specialist, or psychologist" and which covers basically the four areas of information also suggested by Dr. Hagin. (*Id.* at 53-54, 170.) Mr. Fuller reported at trial that most state bar examiners simply accept the diagnosis of learning disability submitted in a an applicant's report but that approximately ten states use experts in assisting them in reviewing applicants' documentation. (Tr. at 880-81.) At least one state, Michigan, uses a panel of four individuals--including a psychiatrist, a specialist in learning disabilities, and a judge--to evaluate a learning disability application. (Tr. at 882.)

support a conclusion of reading disability. Thus, applicants with test scores remarkably similar to Dr. Bartlett's were given accommodations because they happened to supply a word attack or word identification score below 30% with their first application. Plaintiff, unfortunately for her, only sent Dr. Massad's Form H report with her first application. On that Form, she received scores of above the 30th percentile. Only Dr. Heath first tested plaintiff on Form G. There, she scored in the 28th percentile on the word attack portion of the test. Dr. Vellutino, however, did not give her the benefit of the doubt because he concluded that the report was an anomaly, emphasizing instead other test scores that demonstrated above average, if not superior, reading facility. (Tr. at 1303-05, 2118-19, 2167.)

Recognizing the lack of "concordance" in defining a learning disability, Dr. Vellutino testified at trial that he has recommended to the Board that it not attempt to "get into the business of" trying to evaluate learning disabled applicants. (Tr. at 1997.) Instead, he has recommended that the Board give untimed power tests designed to assess minimum competence by testing specific skills. (Tr. at 1998, 2002, and 2004-005.) The Board has rejected this recommendation. In short, the Board's decision to continue this methodology, despite knowing its deficiencies, leaves much to be desired and suggests an element of arbitrariness, irrationality and capriciousness---even though I cannot find under the law that it rises to the level of a procedural due process violation. Nevertheless, the Board's continued use of its procedures may, in the future, subject it and its members to possible liability under the ADA and the Rehabilitation Act.

IV. PLAINTIFF'S SECTION 1983 CLAIM[34]

Because I have concluded, above, that plaintiff has failed to establish that her rights under the equal protection or due process clauses of the Constitution were violated by the defendants, the only remaining arguable basis for plaintiff's § 1983 claim is the underlying statutory violations of the Rehabilitation Act and the ADA. *See Maine v. Thiboutot,* 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980) (providing that Section 1983 provides a cause of action for violations of federal statutes as well as the Constitution). However, it is important to note that not every statutory violation is actionable under § 1983. Rather, the Supreme Court has set forth two important exceptions to the general rule that § 1983 remedies deprivations of federally secured rights. In *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 508, 110 S.Ct. 2510, 2516-17, 110 L.Ed.2d 455 (1990), the Supreme Court succinctly stated the two exceptions:

> "A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.' "

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[34]Section 1983 provides:

> Every person who, under color of [law] subjects or causes to be subjected any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws,* shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added).

Id. (citing *Wright v. Roanoke Redevelopment & Housing Authority,* 479 U.S. 418, 423, 107 S.Ct. 766, 770, 93 L.Ed.2d 781 (1987)).

Here, plaintiff's case clearly does not fall within the first exception because it is undeniable that the ADA and the Rehabilitation Act create enforceable rights; plaintiff has now successfully litigated and secured such rights in this Court. However, it is equally clear that Congress would not have intended that plaintiffs seek redress for violations of their ADA and Rehabilitation Act rights through the vehicle of § 1983. Despite the Supreme Court's admonition that "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right," *id.* at 520, 110 S.Ct. at 2523 (citations and internal quotation marks omitted), I find that this is one of the limited cases in which Congress did not intend for individuals like plaintiff to seek remedy through § 1983. I note that "[t]he burden is on the State to show by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Id.* at 520-21, 110 S.Ct. at 2523. Where, however,--as here--"the Act [itself] does not expressly preclude resort to § 1983," *id.*, the Court has found "private enforcement foreclosed only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983.' " *Id.* Unquestionably, the ADA and the Rehabilitation Act[35] provide such "sufficiently comprehensive"

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[35]When I refer to the "Rehabilitation Act," it must be remembered that I am referring to the provisions of the Act under which plaintiff's cause of action is brought---not other provisions or Titles of the Act. I note this because the Second Circuit has held that violations of Title I of the Act---which does not provide for a private cause of action---can be redressed via a § 1983 action. *See Marshall v. Switzer,* 10 F.3d 925, 930 (2d Cir.1993) (noting that the Supreme Court typically forbids prosecution under § 1983 whore "the statutes at issue themselves provide[ ] for private judicial

remedies for violations of plaintiff's rights that I do not countenance allowing plaintiff to recover under § 1983 as well. *See Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (holding that the Adoption Assistance and Child Welfare Act of 1980 does not create a federally enforceable right under § 1983 because the language of the Act could be read "to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary...."); *Messier v. Southbury Training School,* 916 F.Supp. 133, 142-46 (D.Conn.1996) (discussing precedent in this context and assessing whether *Suter* obviated the *Wilder* analysis with respect to the first exception).

V. PLAINTIFF'S DAMAGES

Having concluded that plaintiff's rights under the ADA and the Rehabilitation Act were violated, I now move to the question of damages. First, I will consider whether the individually-named defendants are entitled to qualified immunity for their conduct. Then, I will assess whether plaintiff can recover injunctive relief, declaratory relief, compensatory damages, and punitive damages.

A. *Qualified Immunity*

In a recent opinion, the Second Circuit succinctly summarized the law of qualified immunity:

> Public officials are entitled to qualified immunity from claims for damages if (1) their conduct did not violate federal statutory or constitutional rights that were clearly established at the time, or (2) it was objectively

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remedies, thereby evidencing congressional intent to supplant the § 1983 remedy.").

> reasonable for them to believe their acts did not violate those rights. In determining whether a right was clearly established, we consider (1) whether the right in question was defined with 'reasonable specificity', (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question, and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Brown v. City of Oneonta, 106 F.3d 1125, 1130-31 (2d Cir.1997) (citations and internal quotation marks omitted).

1. *Clearly Established Right*

As noted above, there is a three-prong test to determine whether a right was "clearly established" at the time of defendant's conduct. *See id.* First, the Court must look to whether the right was defined with "reasonable specificity." Here, the right at issue was plaintiff's entitlement to reasonable accommodations in the taking of the state bar examination. As can be seen from the lengthy discussion above, this Court is of the opinion that plaintiff's entitlement to accommodations in the taking of the bar examination was not defined with reasonable specificity under either statute. Nor, under the second prong of the test, was the case law immensely helpful on this question. Therefore, under the third prong of the test, I must conclude that a reasonable defendant would not have understood that his or her acts were unlawful. This Court had to go to extraordinary lengths to determine whether plaintiff was substantially impaired under the law and to evaluate the many disagreements among the experts. I cannot find, therefore, that the individual defendants acted unreasonably when they determined that plaintiff was not disabled under the law.

2. *Objectively Reasonable Conduct*

However, even if I were to find that plaintiff's right to reasonable accommodations on the bar examination were "clearly established" at the time of defendants' conduct, I nevertheless would conclude that the defendants' conduct was objectively reasonable. Defendants seemingly made an attempt to comply with the statutes. Their only error was in the base group to which they compared plaintiff, and this error was only exacerbated by the tremendous degree of confusion in the literature of learning disabilities regarding what constitutes a learning disability--as well as the somewhat unsettled state of the law regarding whether a professional licensing examination is a "work activity" (and necessarily whether the legal profession is a sufficiently "broad" category of jobs) entitling plaintiff to be compared to a population with similar skills, training, and experience. *See Giacalone v. Abrams,* 850 F.2d 79, 85 (2d Cir.1988) (requiring the Court "to consider the operation of the rule in the context of the circumstances with which [the official] was confronted."). Because the Court itself was challenged by the legal issues presented in this case, I cannot deem defendants' conduct objectively unreasonable. I remain mindful of the policies underpinning the doctrine of qualified immunity, which provide that:

> The doctrine of qualified immunity attempts to balance the strong policy of encouraging the vindication of federal civil rights by compensating individuals when those rights are violated, with the equally salutary policy of attracting capable public officials and giving them the scope to exercise vigorously the duties with which they are charged, by relieving them from the fear of being sued personally and thereby made subject to monetary liability.

Rodriguez v. Phillips, 66 F.3d 470, 475 (2d Cir.1995). For these reasons, and because I find that their conduct was objectively reasonable, I conclude that all of the individually-named defendants are entitled to qualified immunity.[36]

B. *Injunctive and Declaratory Relief*

Having demonstrated that she is disabled under the ADA and the Rehabilitation Act, plaintiff is entitled to injunctive relief in the form of reasonable accommodations on the bar examination. Plaintiff seeks the following injunctive relief: "double time;[37] the use of a computer;[38] permission to circle multiple choice answers in the examination booklet and large

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[36]Because I find that all of the individual defendants are entitled to qualified immunity, I need not reach the question whether individual liability exists under either Act. *See, e.g., Lane v. Maryhaven Center of Hope*, 944 F.Supp. 158, 161 (E.D.N.Y.1996) (recognizing that the Second Circuit has not yet answered the question whether individual liability exists under the ADA, but analyzing lower court cases as well as Second Circuit precedent under Title VII and concluding that individual liability does not exist).

[37]Mr. Fuller testified in his trial affidavit that the Board has provided "up to four days for taking the examination" to other applicants. (Fuller Aft. p 86.) The Board has proffered no reason why plaintiff's requested accommodation for double time is unreasonable. Accordingly, I find the requested four days to be a reasonable accommodation in this case.

[38]Although there was testimony at trial that Mr. Fuller and the Board were "resistan[t]" to the use of computers on the bar examination, (*see* Tr. at 887-893), I find the use of a computer or wordprocessor to be a reasonable accommodation. Any of the Board's security concerns about the use of a computer can be alleviated either by a computer technician's inspection of the hardware before each session of the examination, or, in the alternative, by the use of a proctor to monitor the applicant's use of the computer during the examination. Moreover, the Board's arguments carry little weight to the extent the Board admits that it has approved the use of computers by other applicants in the past. (Tr. at 890.)

print on both the New York State and Multistate Bar Exam." (Pl.'s Post-Trial Mem. at 83.) I agree that plaintiff is entitled to this injunctive relief under the Act. I do not conclude, however, that declaratory relief is appropriate in this case. As defendants aptly point out, this is not a class action, and plaintiff does not have standing to seek declaratory relief, or any relief beyond that relief necessary to remedy her individual claim. Accordingly, I grant plaintiff the individual, injunctive relief she seeks under the act. *Cf., D'Amico v. New York State Board of Law Examiners,* 813 F.Supp. 217, 223-24 (W.D.N.Y.1993) (granting preliminary injunction requiring Board to provide all testing accommodations recommended by applicant's physician, including the provision of a "four-day testing schedule consisting of six hours of testing per day plus a one hour lunch break each day.").

C. *Compensatory Damages*

As one court has noted, "[t]he relief provisions of Title II of the ADA are complex; one must trace a chain of legislation and caselaw through several steps to reach the operative law." *Tafoya v. Bobroff,* 865 F.Supp. 742, 748 (D.N.M.1994), *aff'd,* 74 F.3d 1250 (10th Cir.1996). The curious labyrinth begins with the damages provision of the ADA, which states that the "remedies, procedures, and rights" under the Act "shall the be the remedies, procedures, and rights" provided under the Rehabilitation Act. 42 U.S.C. § 12133.[39] The Rehabilitation

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[39]In making this pronouncement, the ADA provision is unclear, however. It refers to "section 794a of Title 29" (which is the Rehabilitation Act damages provision) without specifying whether § 794a(a)(1) or § 794a(a)(2) is the operative and controlling provision for purposes of the ADA. Unfortunately, this is a critical distinction. Subsection 794a(a)(1) provides that the "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964" shall control Rehabilitation Act claims brought under section 791 of the Rehabilitation Act. 29 U.S.C. § 794a(a)(1). Subsection 794a(a)(2), however, states that Rehabilitation Act claims brought under

Act, in turn, provides that for "any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title," the damages available shall be the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*] ..." 29 U.S.C.A. § 794a(2). Unfortunately, because Title VI of the Civil Rights Act was an implied cause of action instituted by the Courts rather than Congress, there is some uncertainty regarding what damages are available to plaintiffs under Title VI, particularly in cases where there is no clear evidence of intentional discrimination.

"section 794 of this Title"--(Section 504 of Rehabilitation Act) shall be governed by the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." *See* 29 U.S.C. § 794a(a)(2).

Despite the lack of clarity in the provision, numerous courts have stated that the damages provision controlling the ADA is the damages provision of Section 504 of the Rehabilitation Act, or § 794a(a)(2), which looks to the remedies provided under Title VI of the Civil Rights Act. *See, e.g., Tafoya v. Bobroff,* 865 F.Supp. 742, 748-750 (D.N.M.1994) (discussing the important differences between § 794a(a)(1) and (a)(2), and concluding that the ADA is governed by § 794a(a)(2)); *Hernandez v. City of Hartford,* 959 F.Supp. 125, 133 (D.Conn.1997) (providing, without explanation or distinction between § 794a(a)(1) and (a)(2) that the damages remedy of the ADA should be the same as the damages available under the Rehabilitation Act). Because this Court believes that Congress intended Section 504 damages to govern ADA claims--not the provisions of the Rehabilitation Act that deal with administrative determinations, I will follow the lead of my colleagues and analyze plaintiff's claim under § 794a(a)(2), which then requires me to look to the remedies outlined in Title VI of the Civil Rights Act of 1964.

I should also note that defendants concede that § 794a(a)(2), pointing as it does to Title VI, is the appropriate provision for establishing damages under the ADA. (*See* Defs.' Post-Trial Mem. at 122 & n. 20.)

1. *Whether (and What) Intent is Required to Recover Compensatory Damages*

Most, but not all, courts agree that compensatory damages are recoverable under the ADA and Section 504 only in cases involving intentional discrimination. *See, e.g., Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 630-31, 104 S.Ct. 1248, 1252-53, 79 L.Ed.2d 568 (1984) (providing that "[w]ithout determining the extent to which money damages are available under § 504, we think it is clear that § 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay."); *Wood v. President & Trustees of Spring Hill College,* 978 F.2d 1214, 1219-20 (11th Cir.1992) (providing that "controlling precedent on Title VI remedies, made applicable to section 504 actions under the Rehabilitation Act, indicates that compensatory damages are precluded in cases of unintentional discrimination, but are permissible on a showing of intentional discrimination.") (citing, *inter alia, Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983); *Franklin v. Gwinnett County Public Schools,* 911 F.2d 617, 621 (11th Cir.1990), *rev'd on other grounds,* 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992)); *Naiman v. New York University,* 1997 WL 249970, *5 (S.D.N.Y.1997) (providing that while "there is still some disagreement as to the scope of available remedies under the [Rehabilitation Act], most courts agree that compensatory damages are available"; leaving aside question whether intent was required since sufficient intent could be inferred from the fact that plaintiff requested an accommodation and was denied it); *Sharp v. Abate,* 887 F.Supp. 695, 699 (S.D.N.Y.1995) (stating in wrongful termination case that "[c]ompensatory damages, including emotional damages, as well as punitive damages are available under the ADA," without expressly holding that a finding of intent was required); *Zaffino v. Surles,* 1995 WL 146207, *2-3 (S.D.N.Y.1995) (surveying the law after *Franklin* and concluding that "*Franklin* strongly suggests that

Title VI and [the Rehabilitation Act] should be read as authorizing all traditional legal and equitable remedies" but noting that at least in instances of intentional discrimination, there should be no distinction between the recovery of pecuniary versus non-pecuniary damages); *Hernandez v. City of Hartford,* 959 F.Supp. 125, 133 & n. 10 (D.Conn.1997) (following the Court's prior analysis finding that *Franklin* dictated that damages were available under the Rehabilitation Act, the Court extends this analysis to the ADA but distinguishes a case from another jurisdiction on the grounds that that case did not involve intentional discrimination); *DeLeo v. City of Stamford,* 919 F.Supp. 70, 72-74 (D.Conn.1995) (concluding that *Franklin* mandates that compensatory damages are recoverable under the Rehabilitation Act); *Adelman v. Dunmire,* 1996 WL 107853, *4 (E.D.Pa.1996) ("Compensatory damages are ... unavailable absent an allegation and proof of an intentional violation of Title II."); *Tyler v. City of Manhattan,* 849 F.Supp. 1442, 1444 (D.Kan.1994) (concluding that especially in cases of unintentional discrimination, compensatory damages under the ADA are not available). *But see Wilder v. City of New York,* 568 F.Supp. 1132 (E.D.N.Y.1983) (holding that "[a]lthough the Court in *Guardians Assn.* requires a showing of discriminatory intent before awarding damages, such a showing is unnecessary here. Section 504 differs from Title VI in that discriminatory intent is not essential to a violation of the Rehabilitation Act.").[40]

Much of this conclusion rests on the Supreme Court's holding in *Guardians Ass'n v. Civil Service Comm'n of the City of New York,* 463 U.S. 582, 598, 103 S.Ct. 3221, 3230, 77 L.Ed.2d 866 (1983) and its progeny which provides that intentional discrimination is a prerequisite to recovery under

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[40]For a cogent discussion of the Section 504 damages question, See generally Sarah Poston, *Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 504 Damages Issue,* 1992/1993 Ann. Surv. Am. L.419.

Title VI. In *Guardians,* a much-divided Supreme Court explained why a finding of intent was necessary:

> Since the private cause of action under Title VI is one implied by the judiciary rather than expressly created by Congress, we should respect the foregoing considerations applicable in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder....
>
> In the typical case where deliberate discrimination on racial grounds is not shown, the recipient [of federal funds] will have at least colorable defenses to charges of illegal disparate-impact discrimination, and it often will be the case that, prior to judgment, the grantee will not have known or have had compelling reason to know that it had been violating the federal standards. Hence, absent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations. Additional relief in the form of money or otherwise based on past unintentional violations should be withheld.

Id. But see Consolidated Rail Corp., 465 U.S. at 630 n. 9, 104 S.Ct. at 1252 n. 9 (explaining that when all the votes were tallied in *Guardians* "[a] majority of the Court agreed that retroactive relief is available to private plaintiffs for all discrimination, *whether intentional or unintentional,* that is actionable under Title VI.") (emphasis added).

The Supreme Court's more recent holding in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 74, 112 S.Ct. 1028, 1037, 117 L.Ed.2d 208 (1992) permitting compensatory and punitive damages under Title IX of the Civil Rights Act further explains the Court's thinking on this question. There the

Court stated that "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged." *Id.* at 74-75, 112 S.Ct. at 1037.

As plaintiff aptly alludes in her papers, however, the concept of intent in an accommodations case such as this one is markedly different from the concept of intent in employment discrimination cases or in cases involving a palpable bias or animus against disabled persons. In those cases, there is a negative action taken toward an employee because of his or her disability (most often a termination or an alteration in the terms or conditions of employment) or an adverse action taken against a group of disabled individuals because of their disability. In the instant case, however, as in all accommodations cases, the concept of intent is more difficult to pinpoint because it is the defendants' failure to provide the plaintiff with an advantage which is the very subject of the "discrimination." In this sense, an accommodations case falls somewhere between the "disparate impact" sort of discrimination case to which the Supreme Court referred in *Guardians* and *Franklin* and the sort of direct, intentional discrimination that is the run-of-the-mill discrimination case in the employment context.

Here, it is clear that defendants did something intentionally. It was not that they had a facially neutral policy which resulted in a disparity of disabled individuals being adversely impacted, as was the case in the Title VI cases discussed in *Guardians* and *Franklin.* Rather, defendants *intentionally* withheld from plaintiff an accommodation to which this Court has deemed she was entitled. Clearly, defendants were of the opinion that under the law, Dr. Bartlett was not a disabled individual, but one cannot say that they were without notice that Dr. Bartlett was claiming a disability. And notice is what the Supreme Court

appeared concerned with in both *Guardians* and *Franklin.* As plaintiff writes in her Post-Trial Reply brief:

> Most reasonable accommodations case [sic] do not raise issues of lack of notice because they arise only after a defendant has rebuffed a specific request from a person with a disability. In such a situation, the defendant is put on notice before the filing of the lawsuit. The risk of surprise is not a [sic] great as it may be in disparate impact disputes.

(Pl.'s Post-Trial Reply Mem. at 68). Therefore, it is fair to charge defendants with notice, and thereby intent, of their wrongful failure to provide a reasonable accommodation. Undoubtedly, the defendants believed what they were doing was within the confines of the law (*but see* Pl.'s Post-Trial Reply at 59-61 (detailing defendants' admitted errors and inconsistencies in the processing of accommodations applications and discussing Department of Justice investigation of Board for its failures)), but it could be said that almost every defendant harbors such a belief. The question really is, then, who pays the price for the inherent miscalculation in such a belief, especially where, as here, it is clear that defendants at least negligently arrived at their conclusion that Dr. Bartlett was not learning disabled.

The Supreme Court's analysis in *Alexander v. Choate,* 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) is somewhat instructive on the question of what level and sort of intent should be required to trigger damages under the Acts. There, the Court held that Congress intended the Rehabilitation Act to cover instances of non-intentional discrimination. Although the Court did not address the question of damages, the Court explained that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference-

-of benign neglect.... Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative aninus." *Id.* at 296, 105 S.Ct. at 718. The Court recognized and affirmed that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not, impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-97, 105 S.Ct. at 718. The Court explained:

> For example, elimination of architectural barriers was one of the central aims of the Act, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped.... And Senator Humphrey, again in introducing the proposal that later became § 504, listed, among the instances of discrimination that the section would prohibit, the use of "transportation and architectural barriers," the "discriminatory effect of job qualification ... procedures," and the denial of "special educational assistance" for handicapped children. These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.

Id. at 297, 105 S.Ct. at 718. Likewise, in the instant case, it could be similarly argued that "much of the conduct that Congress sought to alter in passing" the Rehabilitation Act as well as the ADA "would be difficult if not impossible to reach" if the Acts are construed only to provide damages for that "conduct fueled by a discriminatory intent." *Id.* at 296-97, 105 S.Ct. at 718. While *Alexander* 's holding extending the Rehabilitation Act's reach to disparate impact cases is admittedly a far cry from a holding that compensatory damages may be recovered in such cases, I think the case helps illustrate the

purposes of Congress in passing the Rehabilitation Act, and by extension, the ADA. At the very least, it demonstrates an awareness on the part of the Supreme Court that the concept of intent differs markedly in accommodations cases, and hence that a different conception of intent is appropriate for recovery of compensatory damages in non-employment accommodations cases.

In *Wilder v. City of New York,* 568 F.Supp. 1132 (E.D.N.Y.1983), Judge McLaughlin (then of the Eastern District) used an analogous logic to dispense with the intent requirement altogether in accommodations cases. He wrote:

> Although the Court in *Guardians Assn.* requires a showing of discriminatory intent before awarding damages, such a showing is unnecessary here. Section 504 differs from Title VI in that discriminatory intent is not essential to a violation of the Rehabilitation Act.

Id. at 1136. A short time ago, Judge McKenna of this Court, without answering the question whether intent was a prerequisite to the recovery of compensatory damages, found intent where a reasonable accommodation was denied. He wrote:

> Assuming that intent is a prerequisite for monetary relief under the [Rehabilitation Act], [plaintiff's] allegation that he requested a qualified interpreter, which was not provided, coupled with the absence of any allegation that [the defendant] attempted to provide [the plaintiff] with effective communication, sufficiently alleges intent

Naiman v. New York University, 1997 WL 249970, *5 (S.D.N.Y.1997). *See also J.L. v. Social Security Administration,* 971 F.2d 260, 262-265 (9th Cir.1992) (providing that

plaintiffs could recover compensatory damages where they were denied reasonable accommodations in the procedure for security social security benefits); *Greater Los Angeles Council on Deafness v. Zolin,* 812 F.2d 1103, 1106-09 (9th Cir.1987) (permitting action for monetary relief to proceed in case involving refusal to provide interpreters to prospective jurors who were deaf).

In the end, what all of these cases reveal, and what the clear policy of Congress mandates,[41] is that the question of intent in accommodations cases does not require that plaintiff show that defendants harbored an animus towards her or those disabled such as she. Rather, intentional discrimination is shown by an intentional, or willful, violation of the Act itself. With this understood, it becomes clear, that while defendants may have had the best of intentions, and while they may have believed themselves to be-within the confines of the law, they

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[41]Congress clearly intended to provide for compensatory damages in situations such as the instant case. As plaintiff describes in her Post-Trial Reply Memorandum:

> Senator Harkin, the chief sponsor of the [ADA] in the Senate, emphasized that damages were available to private litigants under Title II:
>
> It is true that the employment provisions of title I make available the rights and remedies of title VII of the Civil Rights Act, which provides for backpay and equitable relief. Also under ... title III, the bill expressly limits relief to equitable remedies. *However, title II of the Act, covering public services, contains no such limitations. Title II of the bill makes available the rights and remedies also available under Section 505 of the Rehabilitation Act, and damages remedies are available under ... section 504 of the Rehabilitation Act and, therefore also under title II of this bill.*
>
> 135 Cong. Rec. 19,855 (1989) (emphasis added).
>
> (Pl.'s Post-Trial Reply Mem. at 65.)

nevertheless intentionally violated the ADA and the Rehabilitation Act by willfully withholding from plaintiff the reasonable accommodations to which she was entitled under the law. They had notice of the potential risk of their decision, and clearly refused the accommodation knowingly. Therefore, to the extent that intent may be held to be required for recovery of damages under the Acts, plaintiff has met her burden of proof on this issue, and she is entitled to compensatory damages.

2. *The 1991 Amendment to the Civil Rights Act*

Although this case, as discussed above, implicates--for purposes of determining whether plaintiff is "substantially impaired"--the "major life activity of working," I cannot say that this is an "employment case." Therefore, the 1991 Amendment to the Civil Rights Act is inapplicable as it pertains only to individuals who have been discriminated against by employers making employment decisions. *See* 42 U.S.C. § 1981a(a). The defendants in this case are not employers; rather, they are the legal entity charged with testing bar applicants who are seeking professional licenses to practice law. There were no terms or conditions of employment at issue and therefore the 1991 Amendment to the Civil Rights Act is not relevant. *See, e.g., Tyler v. City of Manhattan,* 849 F.Supp. 1442, 1445 (D.Kan.1994) (holding that because "the Civil Rights Act of 1991 amended only those portions of the ADA that prohibit discrimination in employment ... [and because] [t]he plaintiff's claims in this case have nothing to do with employment ... the Civil Rights Act of 1991 does not entitle plaintiff to compensatory damages....").[42]

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[42]It should be noted that in the 1991 Amendment to the Civil Rights Act, Congress established, in essence, a good faith defense for defendants who have wrongfully denied plaintiffs a reasonable accommodation. The Act states:

3. *Computation of Compensatory Damages*

Having found that compensatory damages are appropriate, I now move to the question of what damages have been proven in this case. Although plaintiff submitted evidence and testimony regarding purported losses in salary and benefits (and the accompanying incurring of greater debt) that she suffered as a result of not having passed the bar examination, (*see* Letter from Jo Anne Simon to the Court (May 28, 1996)), I find that these calculations are unduly speculative. As defendants correctly point out, "plaintiff has failed to prove that with accommodations she would have passed the Bar exam." (Letter from Gregory J. McDonald to the Court (Aug. 28, 1996)). Although this Court holds the greatest hope for Dr. Bartlett's ability to pass the bar examination, the painful truth is that even when she was granted accommodations on the examination pursuant to this Court's preliminary injunction, she did not pass. Although

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> In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C.A. § 1981a(a)(3). Again, however, by the express language of the provision (including the last line which refers to the "operation of the business"), this rule applies only in employment cases, not in a case covered by Title II of the ADA. Furthermore, I cannot say that defendants made a good faith effort "to identify and make a reasonable accommodation" to plaintiff. Although defendants may have been acting in good faith when they attempted to discern whether plaintiff was learning disabled, because of their faulty conclusion on that question, they never reached the point where there were making a good faith effort to accommodate her.

the Court accepts that plaintiff may have had difficulty adjusting to the use of a amanuensis, the fact remains that even when plaintiff was granted the accommodations she desired in law school, her grade point average and/or class standing did not appreciably improve. Moreover, she did not pass the Pennsylvania Bar Examination in which she was given the accommodations she requested. These facts, coupled with the inherent speculation of predicting what one's career might have become and whether or not another law firm would have hired plaintiff after her original law firm disbanded, render a great portion of plaintiff's claim for compensatory damages unduly speculative.[43] *Cf.* Edward A. Adams, *ABA Sees Lingering Problems at CUNY Law School,* N.Y. L. J., April 22, 1996, at 1 (providing that while the state-wide passing rate on the bar examination is roughly 80%, at some schools it is as low as 39%).

What is clear is that plaintiff's taking of the bar examination without the accommodations to which she was entitled under the law was a waste of her time and money. For these losses, plaintiff should be reimbursed. Plaintiff claims that she "incurred costs of $2,500" for each of the five bar examinations that she took. (*See* Letter from Jo Anne Simon, *supra,* at 2 ("$2,500 for each of four additional bar examinations"); Pl.'s Post-Trial Mem. at 82 (plaintiff "incurred the expenses associated with taking the Bar Exam and bar review courses five (5) times").) The Court accordingly awards plaintiff compensatory damages in the amount of $12,500.00.

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[43] As for plaintiff's assertions regarding the mental pain and humiliation that she suffered as a result of not passing the bar examination, I likewise cannot find that such damages, if incurred and recoverable, should be recompensed. It is impossible to separate the pain and humiliation suffered by plaintiff because she failed the exam without accommodations, from the pain and humiliation she might have felt, as do many unsuccessful bar exam applicants, from failing the exam even with accommodations. Hence, I do not grant plaintiff damages for mental anguish.

D. *Punitive Damages*

As with compensatory damages, courts are divided on the question of whether punitive damages are recoverable under the ADA and/or the Rehabilitation Act, especially as against a governmental entity. *Compare U.S. Equal Employment Opportunity Comm'n v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1285-1287 (7th Cir.1995) (upholding compensatory and punitive damages award in ADA employment case); *Sharp v. Abate*, 887 F.Supp. 695, 699 (S.D.N.Y.1995) (Kaplan, J.) (holding that "[c]ompensatory damages, including emotional damages, *as well as punitive damages* are available under the ADA.") (emphasis added); *DeLeo v. City of Stamford*, 919 F.Supp. 70, 72-74 & n. 4 (D.Conn.1995) (holding that "punitive damages are included within the full panoply of remedies and must be available for a violation of the Rehabilitation Act 'absent clear direction to the contrary by Congress.' "); *Kilroy v. Husson College*, 959 F.Supp. 22, 24 (D.Maine 1997) (providing that punitive damages are recoverable under the ADA); *Kedra v. Nazareth Hospital*, 868 F.Supp. 733, 740 (E.D.Pa.1994) (concluding after discussion that punitive damages are recoverable under Section 504) *with Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 784 (6th Cir.1996) (holding that punitive damages are not recoverable under Section 504); *Adelman v. Dunmire*, 1996 WL 107853, *4 (E.D.Pa.1996) (providing that "punitive damages are not available from a governmental entity"); *Harrelson v. Elmore County, Alabama, City of Millbrook, Alabama*, 5 Nat. Disability Law Rep. 297, 859 F.Supp. 1465 (M.D.Ala.1994) (holding that "punitive damages are not available to a plaintiff asserting a claim under Title II of the ADA" in part because "Congress' express provision of punitive damages under Title I of the ADA via the Civil Rights Act of 1991 counsels against a statutory construction that punitive damages are available under Title II by inference."). However, I need not address the question whether punitive damages are available under either Act in this case because even

if I found them to be available, I would conclude that defendants' conduct do not warrant them. *Cf., Luciano v. Olsten Corp.*, 110 F.3d 210, 220-21 (2d Cir.1997) (providing that the statutory standard for punitive damages under Title VII and under the 1991 Amendment to the Civil Rights Act is the "same as the language in other civil rights laws": punitive damage are appropriate where a defendant discriminates "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."); *Kilroy v. Husson College*, 959 F.Supp. 22, 24 (D.Maine 1997) (providing that punitive damages are recoverable under the ADA "if a plaintiff demonstrates that her employer 'engaged in discriminatory behavior with 'malice' or 'reckless indifference' to her federally protected rights.' "). Because of the "chaos" in the learning disability field and the ambiguity in the law, I do not find the level of "malice" or "reckless indifference" to federally protected rights that would justify an award of punitive damages.

CONCLUSION

For the reasons discussed, I find that plaintiff is disabled under the ADA and under Section 504 and that the Board's failure to accommodate her reasonably on the New York State Bar Examination amounted to discrimination under the ADA and Section 504. I do not find, however, that plaintiff has established an equal protection, due process, or a § 1983violation by defendants.

I further conclude that all of the individually-named defendants are entitled to qualified immunity and that plaintiff is entitled to injunctive relief in the form of reasonable accommodations on the examination. I award compensatory damages in the amount of $12,500.00. I do not award punitive damages.

Plaintiff shall also receive the following reasonable accommodations in the taking of the bar examination, should she decide to re-take it in the future:

(1) double time over four days;

(2) the use of a computer;

(3) permission to circle multiple choice answers in the examination booklet; and

(4) large print on both the New York State and Multistate Bar Examinations.

The Clerk of the Court is hereby directed to enter judgment in accordance with this Opinion.

SO ORDERED.

Appendix C - Order of the District Court denying reconsideration , filed August 15, 1997.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 93 Civ. 4986(SS)
August 15, 1997.

Marilyn J. BARTLETT, Plaintiff,

v.

NEW YORK STATE BOARD OF LAW EXAMINERS; James T. Fuller, Individually and as Executive Secretary, New York State Board of Law Examiners; John E. Holt-Harris, Jr.,Individually and as Chairman, New York State Board of Law Examiners; Richard J. Bartlett, Individually and as Member, New York State Board of Law Examiners, Laura Taylor Swain, Individually and as Member, New York State Board of Law Examiners, Charles T. Beeching, Jr., Individually and as Member, New York State Board of Law Examiners and Ira P. Sloane, Individually and as Member, New York State Board of Law Examiners, Defendants.

MEMORANDUM OPINION AND ORDER

SOTOMAYOR, District Judge.

Defendants move, pursuant to Fed.R.Civ.P. 59(e) and 60(b), for amendment of the judgment or relief from the decision and order of this Court rendered on July 3, 1997 (the "Opinion"), familiarity with which is assumed. For the reasons to be discussed, defendants' motion is DENIED.

I. The Court's Use of The EEOC Regulations Under Title I of the ADA

A. *The Appropriateness of Employing Title I Regulations Generally*

In its Opinion, the Court used the regulations promulgated by the EEOC under Title I of the Americans with Disabilities Act (the "ADA" or the "Act") to elucidate and expand upon the Court's understanding of the concept of "substantial limitation" as it relates to defining who is disabled under the Act. The Court employed the Title I regulations for this purpose even though plaintiff's claim was brought under Titles II and III of the Act, and the Department of Justice, not the EEOC, is charged with promulgating regulations pursuant to those titles. While neither party directly challenges the Court's use of the EEOC regulations and interpretive guidance, the tenor of the defendants' instant motion for reconsideration implies that the use of the Title I regulations was somehow inappropriate.[1] The Court disagrees for the following reasons.

Initially, one must understand, how, if at all, regulations under Title I and Title II differ, keeping in mind that the statutory definition of "disabled" is the same for all titles of

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[1]The Defendants only raise the question vaguely in a footnote in their brief:

> Both this Court and the court in *Price* rely upon EEOC regulations for guidance even though they pertain only to Subchapter I which addresses workplace discrimination and neither this case nor *Price* were filed against employers nor do they involve discrimination in the workplace.

(Defs.' Brief at 4 n. 2). Although defendants raise the question, they do not discuss it further, nor do they explain why they likewise relied upon the EEOC regulations in presenting their arguments to the Court.

the Act and that no agency is imbued with dispositive authority to state what the term means. The only difference between the Title I regulations promulgated by the EEOC and the Title II regulations promulgated by the Justice Department is that the EEOC goes to much greater lengths to explore the concept of substantial limitation, particularly as that concept relates to the major life activity of working. Both sets of regulations define a disability--according to the statutory definition--as an impairment that substantially limits any major life activity. Both regulations list the following examples of major life activities: "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and *working*." 29 C.F.R. § 1630.2(i) (Title I regulation) (emphasis added); 28 C.F.R. § 36.104(2) (Title II regulation) (emphasis added).

Clearly, then, the Department of Justice in promulgating rules under Title II contemplated an assessment of a plaintiff's impairment under the major life activity of working. The only question is whether the Department of Justice regulations under Title II forecloses application of the EEOC's interpretation that substantial limitation in the context of the major life activity of working should be measured by a different reference population--by a comparison to "the average person with comparable training, skills and abilities" 29 C.F.R. § 1630.2(j)(1)(ii) rather than "the average person in the general population." 29 C.F.R. § 1630.2(j)(3)(i).[2] I hereby

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[2]The Justice Department regulations under Title II merely define the phrase "major life activities", without giving any definition of "substantial limitation" or any reference to whether or what comparison should be made in finding a substantial limitation. In its analysis of the definition of "major life activities," the Department only discusses the concept of substantial limitation briefly, without defining what it means. Its analysis explains that "[a] person is considered an individual with a disability ... when the individual's important life activities are restricted as to the conditions,

reaffirm my prior conclusion that the EEOC's interpretation of substantial limitation in the context of the major life activity of working is both a part of, and consistent with, the Department of Justice's regulations and the purpose of the ADA.

I reach this conclusion in part because of the cooperative spirit in which the regulations were promulgated. *See, e.g.*, I Henry H. Perritt, Jr., *Americans With Disabilities Act Handbook* § 1.9 (3d ed.1997) (discussing the fact that the Justice Department and EEOC regulations were issued jointly, as required by § 107(b) of the ADA). In addition, the Department of Justice's own "[r]ule of interpretation," under Title II provides: "Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 ... or the regulations issued by Federal agencies pursuant to that title." 28 C.F.R. § 36.103. Notably, the Rehabilitation Act now looks to the standards established by Title I of the ADA and the regulations promulgated thereunder. *See* 29 U.S.C. § 793(d) (providing that "[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act").

In its analysis of this "rule of interpretation," the Justice Department has even more pointedly written: "Title II, however, also incorporates those provisions of titles I and III

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manner, or duration under which they can be performed in comparison to most people." U.S. Equal Employment Opportunity Commission & U.S. Department of Justice, *Americans With Disabilities Act Handbook* II-20 (1992). What the Department neglects to explain is whether "most people" refers to most people in the general population or to most people engaging in that particular life activity. Obviously, such a distinction is of critical importance in this context.

of the ADA that are not inconsistent with the regulations implementing section 504. Therefore, this part also includes appropriate provisions derived from the regulations implementing those titles." 28 C.F.R. § 35.103, App. A, *reprinted in,* Arlene B. Mayerson, ed., *Americans With Disabilities Act Annotated: Legislative History, Regulations & Commentary* Title II - 25 (1997); *see also* H.R.Rep. No. 101-485 at 49-51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 472-74 ("Title II should be read to incorporate provisions of titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973.... However, nothing in the other titles should be construed to lessen the standards in the Rehabilitation Act regulations which are incorporated by reference in Section 204."); U.S. Equal Employment Opportunity Commission & The Department of Justice, *Americans with Disabilities Act Handbook* I-3 (1992) ("It is the intent of Congress that the regulations implementing the ADA be comprehensive and easily understood. Part 1630 [promulgated by the EEOC], therefore, defines terms not previously defined in the regulation implementing section 504 of the Rehabilitation Act, such as "substantially limits ..." Where possible, part 1630 establishes parameters to serve as guidelines in such inquiries.").

From these two statements, it is self-evident that the Department of Justice's own "rule of interpretation" sanctions the use of regulations from a different title to help lend meaning to a concept that is not addressed in its own regulations, *see* note 2, *supra,* provided that the other regulations do not impose or permit a "lesser standard." Here, the Title I regulation merely determines the appropriate characteristics--comparable training, skills, and abilities--of the persons within the general population against which a substantial limitation is measured in the context of the major

life activity of working. The EEOC's conclusion, therefore, does not provide a lesser standard. Moreover, it is perfectly consistent with the Rehabilitation Act, as well as Title II and the remedial nature of the ADA as a whole, and has a sound basis in logic. Thus, the Court's invocation of the Title I regulations as a meaningful interpretive tool was consistent with general rules of statutory interpretation. *See, e.g., Silverman v. Eastrich Multiple Investor Fund,* 51 F.3d 28, 31 (3d Cir.1995) (explaining that there is "a basic tenet of statutory construction, equally applicable to regulatory construction, that a statute 'should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.' ") (citation omitted); *Bower v. Federal Express Corp.*, 96 F.3d 200, 209-10 (6th Cir.1996) (arguing that the better choice is to use another regulation for interpretative guidance rather than interpret a term "without regulatory assistance"); *Yeskoo v. United States,* 34 Fed.Cl. 720, 734 (1996) (providing that "[i]n construing a statute, courts should attempt not to interpret a provision such that it renders other provisions of the same statute inconsistent, meaningless or superfluous.... The meaning of statutory language depends on context, and a statute should be read as a whole.... Therefore, when reviewing the statute and regulations at issue in this case, this court must construe each part of a statute in connection with all the other sections, so as to produce a harmonious whole. Moreover, common sense requires that the same words used twice in the same act should have the same meaning."); *United States v. Hayashi,* 22 F.3d 859 (9th Cir.1993) (providing that a defendant can not be convicted under the regulations of a statute different from that under which he was indicted, but that nevertheless "a regulation implementing a different statute might aid in interpreting those under another

statute."); *Price v. The National Board of Medical Examiners*, 966 F.Supp. 419, 426 & n. 2 (S.D.W.Va.1997) (employing the Title I regulations in a Title II case, and explaining that "The EEOC guidelines do not govern [Title II] because the guidelines pertain only to Subchapter I. However, Congress clearly intended for the term 'disability' (and, therefore, the phrase 'substantially limits') to have a uniform meaning throughout the ADA. Accordingly, wherever possible, the Court must define the phrase 'substantially limits' in a manner consistent with each of the agencies' interpretations."); *Medical Society of New Jersey v. Jacobs*, 1993 WL 413016 (D.N.J.1993) (importing Title I requirements into Title II context); *Ellen S. v. Florida Board of Bar Examiners*, 859 F.Supp. 1489 (S.D.Fla.1994) (applying Title I standard regarding pre-employment inquiries to Title II case involving bar application).

B. *The Appropriateness of Invoking the Major Life Activity of Working*

1. *The Court Considered Other Major Life Activities First*

As previously explained, the defendants do not directly challenge the Court's reliance upon the Title I regulations. In fact, defendants invoke the Title I regulations promulgated by the EEOC as the correct test for assessing disability under the Act. (*See* Defs.' Brief at 3). However, looking to the EEOC regulations, the defendants contend that the Court erred by analyzing plaintiff's impairment as one which impacts the major life activity of working "without first determining whether [plaintiff's impairment] substantially limits her ability to read or learn...." (Defs.' Brief at 4).

Defendants seem to suggest that it only would have been appropriate for the Court to look to the major life activity of

working if it first found that plaintiff was substantially limited in other major life activities. In fact, the reverse is true. If the Court had found, *which it did not,* that plaintiff was substantially limited in any other major life activity, it would have been prevented, by the EEOC analysis, to consider the effect of plaintiff's impairment on any other major life activity, and specifically the major life activity of working. If, however, as was the case, the Court found that plaintiff was *not* substantially limited in the other major life activities, it had a duty to see whether plaintiff was substantially limited in the major life activity of working. *See* 29 C.F.R. Pt. 1630, App., § 1630.2(j).

The interpretive guidance to the EEOC regulations clearly provide that:

> If an individual is not substantially limited with respect to any other major life activity, *the individual's ability to perform the major life activity of working should be considered.* If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.

29 C.F.R. Pt. 1630, App., § 1630.2(j) (emphasis added). In explaining why other major life activities should be considered before the major life activity of working, the EEOC has written:

> Most of the discussion and analysis of substantial limitation has focused on its meaning as applied to the major life activity of working. This is largely because there has been little dispute about what is meant by such terms as "breathing" "walking" "hearing" or "seeing" but much dispute about what is meant by the

term "working." Consequently, the determination of whether a person's impairment is substantially limiting should first address major life activities other than working. If it is clear that a person's impairment substantially limits a major life activity other than working, then one need not determine whether the impairment substantially limits the person's ability to work. *On the other hand, if an impairment does not substantially limit any of the other major life activities, then one must determine whether the person is substantially limited in working.*

For example, if an individual's arthritis makes it unusually difficult (as compared to most people or to the average person in the general population) to walk, then the individual is substantially limited in the ability to walk. In that case, one would not need to ascertain whether the individual is also substantially limited in working. If, however, it was not clear whether the person's impairment substantially limited his/her ability to walk (or to perform other major life activities), then one would have to analyze whether the impairment substantially limited the person's ability to work.

EEOC Compliance Manual § 902--Definition of the Term "Disability"--*reprinted in* Arlene B. Mayerson, *Americans with Disabilities Act Annotated: Legislative History, Regulations & Commentary* App.P. at p. 27 (1994) (emphasis added).

In its Opinion, the Court did the very analysis that defendants insist should have been done by the Court. The Court first considered whether plaintiff was "substantially limited" in her reading when compared to the average person

in the general population. Finding that plaintiff's history of self accommodation enabled her to perform marginally as well as the average person in the general population, the Court concluded that plaintiff was not substantially limited when compared to this population. (*See* Opinion at 56 (stating that when plaintiff's reading skills are compared to the average person in the general population, she would be considered "barely average.")) Then, and only then, did the Court embark on its analysis of whether plaintiff's impairment substantially limited her ability to work. Using the benchmark of "the average person having comparable training, skills and abilities," 29 C.F.R. § 1630.2(j)(3)(i), the Court found that plaintiff was substantially limited and therefore "disabled" under the law. There is nothing in the law, the regulations, or the EEOC guidance to suggest that this analysis was anything but appropriate.

2. *The Appropriateness of Invoking the Major Life Activity of Working*

Despite framing the bulk of their argument in terms of the Court's purported failure to consider other major life activities before considering the major life activity of working, it appears that what actually troubles the defendants is that the major life activity of working was invoked at all. To this end, the defendants place tremendous (and almost exclusive) weight in their reconsideration memorandum on a case from the Southern District of West Virginia, *Price et al v. The National Board of Medical Examiners*, 966 F.Supp. 419 (S.D.W.Va. June 6, 1997). Although the case and the arguments found therein have superficial appeal, especially as applied to the limited facts and legal argument before that court, upon closer examination they are revealed as unpersuasive authority for the issues before this Court.

Price involved a suit for injunctive relief brought by medical students who were seeking additional time and other accommodations on the medical licensing examination administered by the National Board of Medical Examiners. According to the opinion, medical students are required to pass "Step 1" of the examination before proceeding on in their medical school education. This factual context differs markedly from the instant case, of course, where the plaintiff has completed all of the necessary schooling required to practice as a lawyer and where the only obstacle remaining between her and the practice is her passing the bar examination.

After a limited evidentiary hearing (as opposed to the very lengthy trial and voluminous submissions in this case), the *Price* court found that the plaintiffs' "history of significant scholastic achievement" *id.* at 427, in college and medical school evinced the fact that the plaintiffs were not substantially limited in their ability to learn as compared to "most unimpaired persons." *Id.* at 425. Analyzing all of the plaintiffs' impairments under the major life activity of learning (without any mention of the major life activity of working), the Court found that the plaintiffs were "able to learn as well as or better than the average person in the general population." *Id.* at 422. Hence, the court found that the plaintiffs were not disabled under the law.

Price differs from the instant case in an important factual respect. The *Price* plaintiffs all claimed they had Attention Deficit Hyperactivity Disorder ("ADHD").[3] Thus, their very

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[3] Although two of the three plaintiffs had been diagnosed with "Disorder of Written Expression and Reading Disorder," *Price*, 966 F.Supp. at 422, *Price* discussed their impairment, and limited its analysis, to a "learning" disability in the strictest sense of that word.

claims went to their ability to learn, which was belied by their significant achievements in education. However, in the instant case, plaintiff's so-called "learning" disability is in actuality a difficulty in reading words--not in learning *per se*. This is an important distinction because plaintiff's significant accomplishments in education do not belie her claim that she has significant difficulty reading.

In reaching its ultimate conclusion that the plaintiffs were not disabled, the *Price* Court raised the following concern:

> The ADA is not designed "to allow individuals to advance to professional positions through a back door. Rather, it is aimed at rebuilding the threshold of a profession's front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering front door." Jamie Katz & Janine Valles [sic], The Americans with Disabilities Act and Professional Licensing, 17 Mental & Physical Disability L.Rep. 556, 561 (Sept./Oct.1993). If a court were to grant testing accommodations to persons that do not have disabilities within the meaning of the ADA, it would allow persons to advance to professional positions though the proverbial back door. In so undermining the integrity of the USMLE, that court would hinder the Board's ability to distinguish between qualified students and unqualified students.

Price, at 421-22. This argument is reminiscent of the defendants' claims in the instant case. It is true that if nondisabled individuals were granted accommodations on the examination, the examination's integrity would be

compromised.[4] What the defendants and the *Price* court fail to recognize, however, is the impact of measuring applicants' impairments against inappropriate reference characteristics and how that practice would systematically result in persons with legitimate impairments being found not disabled under the Act, thereby seriously compromising the purpose of the Act, which is to employ disabled individuals to their fullest potential.

By measuring a disability for purposes of a professional examination against a reference population that would otherwise be totally unprepared and unqualified to take such an examination, the findings of such applicants' disability is automatically skewed against a finding of disability. The ADA and its dictates are highly context-specific. See, e.g., 29 C.F.R.

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[4]It is important to underscore that bar examinations, like many other licensing examinations, purport to test technical knowledge and expertise and not reading speed or fluidity. This Court has specifically found, and the Bar Examiners conceded at trial, that neither reading speed or automaticity are tested on the New York Bar Examination. *See* Opinion at 74, 78-79. Often, one scholar has noted, concerns that the integrity of examinations may be compromised by granting accommodations to the learning disabled are premised on the fallacy shared by many licensing examiners that "applicants with learning disabilities are either slow readers without any real impairment--and therefore not disabled--or not bright enough to pass the pertinent exam." Deborah Piltch et al., *The Americans With Disabilities act & Professional Licensing*, 17 Mental & Physical Disability L.Rep. 556, 558 (Sept./Oct.1993). This fallacy appeared to affect the attitudes of some of the defendants in the instant case. *See* Opinion at 91-92. Unlike the *Price* Court, however, this Court has found that the plaintiff before it is not a slow reader but rather is a person with an impairment that affects her ability to read with the automaticity and speed of the average person with comparable training, skills and abilities. *See* Opinion at 69-70. Care must be taken by courts (as Dr. Hagen noted is taken by trained psychologist in diagnosing learning disabilities) not to equate the legal effects of slow reading that arises from an impairment with the legal effects of slow reading arising from intelligence, educational, or emotional problems. The law does not protect the latter but it does require accommodation for the former.

Part 1630 App., § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). Therefore, one can not look to whether an individual is disabled, without considering in what context the individual might be "substantially limited." For example, the *EEOC Technical Assistance Manual* provides:

> An individual who had been employed as a reception-clerk sustained a back injury that resulted in considerable pain. The pain permanently restricted her ability to walk, sit, stand, drive, care for her home and engage in recreational activities. Another individual who had been employed as a general laborer has sustained a back injury, but was able to continue an active life, including recreational sports, and had obtained a new position as a security guard. The first individual was found by a court to be an individual with disabilities. The second individual was found not significantly restricted in any major life activity and therefore not an individual with a disability.

EEOC Technical Assistance Manual at II-4 to 5. Because context is a very important part of the ADA, it would be incongruous to examine a person's impairments outside of the context in which the impairment affects their lives or livelihoods.

Hence, by failing to measure an applicant's disability against the appropriate reference group--those engaging in that particular activity, or, in the words of the EEOC, those with "comparable training, skills and abilities"--applicants are placed in a horrific Catch 22. If an applicant strives hard enough to prove him or herself a "qualified individual" who

has completed the prerequisites for sitting for an examination and who is otherwise capable of performing within the profession, he or she is--almost by definition and by the very nature of his or her accomplishments in graduate work--"average" when compared to the general population.

The bar and medical licensing examinations are not "average" tests geared to "average" persons, however. These sophisticated, professional tests are designed to challenge the analytical abilities of generally above-average achievers. Hence, by failing to employ the major life activity of working standard when a person's entrance into a profession is at stake,[5] courts deny applicants the opportunity to compete on a level playing field when there is no doubt that once the applicants were employed within the profession their disabilities would have to be recognized and accommodated under Title I.

This result is contrary to the remedial nature of the statute, and to Congress' unequivocal desire to employ disabled individuals up to their full potential. *See* S.Rep. No. 101-116, at 9 (1989) ("Individuals with disabilities experience staggering levels of unemployment and poverty. According to

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[5]The argument could be made that many, if not most, standardized tests such as the LSAT, or even the SAT, have an effect on a person's ability to enter a profession to the extent they affect a person's ability to gain the other credentials necessary to enter that profession. Those tests, however, are more generic intelligence tests, and, therefore, are more geared to the average population. Even more importantly, those tests are a considerably less proximate cause for denial of employment in any given area and hence the major life activity of working standard is much less appropriate in that context. Nevertheless, the Court does not have before it such a case. In the instant case, the plaintiff has already successfully achieved all of the requirements for being a lawyer; she merely lacks the license to practice. On any level, the bar examination at issue is a much more appropriate context for employing the major life activity of working than other standardized tests.

a recent Lou Harris poll not working is perhaps the truest definition of what it means to be disabled in America."). Although it can not be said that Dr. Bartlett is unemployed or unemployable, this does not assuage Congress' apparent concern for the employment difficulties of the disabled in America.[6] It is little consolation to tell disabled individuals

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[6]*See* S.Rep. No. 101-116, at 10 (noting among other employment obstacles, disabled individuals' "under-employment"); 135 Cong.Rec. S10712, (daily ed. September 7, 1989) (Statement of Sen. Harkin) (providing that "people with disabilities as a group occupy an inferior status ... vocationally ..."); 135 Cong.Rec. S10717 (daily ed. September 7, 1989) (Statement of Sen. Kennedy) ("Disabled citizens deserve the opportunity to work for a living, ... and do all the other things that the rest of us take for granted."); 135 Cong.Rec. S10789 (daily ed. September 7, 1989) (Statement of Sen. Kennedy) ("With the challenge facing our country, we cannot afford to ignore the talent of the disabled, or neglect the skills they have to offer."); 135 Cong.Rec. S10791 (daily ed. September 7, 1989) (Statement of Sen. Riegle) (explaining that "our economy can no longer afford not to enlist the unique abilities and talents of people with disabilities."); 135 Cong.Rec. S10792-92 (daily ed. September 7, 1989) (Statement of Sen. Biden) ("Too many disabled persons have been locked out of the American workplace, excluded from jobs for which they are more than capable.... [T]oo many people fail to see the intelligence, energy, and potential of millions of Americans. Disabled Americans are not asking for pity or for a handout. They are asking for a *fair chance to compete and take part on an equal basis*.... ") (emphasis added); 136 Cong.Rec. H2433 (daily ed. May 17, 1990) (Statement of Rep. Luken) ("In short, this bill will help our country use an immense amount of talent, intelligence, and other human resources which heretofore have been underestimated, underdeveloped, and underutilized."); 136 Cong.Rec. H2446 (daily ed. May 17, 1990) (Statement of Rep. Gallo) ("For too long, Americans with mental and physical disabilities have been prevented from performing many daily activities of living and from fulfilling dreams of employment, prosperity, and full participation in our communities. Not only has this been a great loss to our communities and to our economy, it has also been an added hardship to the individuals who have struggled so valiantly to overcome the obstacles imposed by their disabilities and for their families who have been by their side all along."); 135 Cong.Rec. S4997 (daily ed. May 9, 1989) (statement of Sen. Cranston) (providing that the "single purpose" of the ADA is "to help ensure that persons with disabilities have the opportunity--freed of the shackles of discriminatory practices--to participate in our society as fully as

that they can seek other forms of employment, but cannot seek employment in fields in which they studied for years. Understanding as it did the employment obstacles that the disabled face in this country, it could not have been Congress's intent to exclude the disabled from participating in large classes of customary professions, such as medicine and the law, merely because they can not receive the accommodations on a licensing exam--accommodations which the law would require them to be given once they began work for an employer. Such a result would be abhorrent--the disabled would be relegated to some form of an underclass--able to practice in jobs that do not require licensing, but wholesale excluded from some of the most prestigious, lucrative, and rewarding professions in our society which do require licensing. Hence I find that the use of the major life activity of working standard and its comparison to the average person of comparable training, skills and abilities was appropriate and consistent with the spirit and letter of the Act.

II. Plaintiff's Purported Failure to State on Her Accommodation Application that She Was Impaired in Her Ability to Work

Finally, defendants argue that in order to recover damages under the Act, plaintiff was required to state on her accommodation application that she was disabled in the major life activity of working. Clearly, the law imposes no such obligation on the plaintiff in order to receive a remedy under

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possible and, thus, to achieve their full potential."); 136 Cong.Rec. H2427 (daily ed. May 17, 1990) (Statement of Rep. Hoyer) ("This bill does not guarantee a job--or anything else. It guarantees a level playing field; the qualified individuals won't be discriminated against because of their disability."); 136 Cong.Rec. H2440 (daily ed. May 17, 1990) (Statement of Rep. Fish) ("This bill aims at opening up opportunities for all persons with disabilities.").

the ADA. The major life activity of working is only part of a legal analysis which helps courts and investigators determine whether a given plaintiff is "substantially limited" and therefore "disabled" as that term is defined under the law. It is not a prerequisite to filing a complaint or to recovery.[7] What these forms, and the ADA, require is that plaintiff list her *impairment,* not what it substantially limits.[8] Plaintiff's impairment is a learning disability that manifests itself in a difficulty in reading and understanding the written word with automaticity; plaintiff expressed this clearly on her application. She was under no obligation to tell defendants more or to explain to defendants that they should consider some of her marginal reading skills in the context of the type of test at issue and the nature of the skills of the population taking the test. By relying exclusively upon an expert whose approach rejects the generally accepted discrepancy theory in identifying learning disabilities, defendants themselves chose to ignore the full context specific dictates of the ADA and Rehabilitation Act.

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[7]Defendants argue that plaintiff should not recover her expenses expended on at least three of the bar examinations because she did not timely apply for accommodations on two of them, and she was granted accommodations on the third. As for the two examinations in which plaintiff's application for accommodations may have been untimely, the Court finds defendants' argument to be specious. The defendants have consistently through the years considered untimely applications. Moreover, the letters denying accommodations for these two tests made clear that the Board considered the lack of merit in plaintiff's application as the primary reason for denying an accommodation. And, as for the third examination on which the Board actually did grant accommodations, recovery is merited given that the accommodations granted were neither those that the plaintiff requested nor those to which the Court has deemed plaintiff was entitled.

[8]The Court notes that there is no such thing as a *per se* working disability, and certainly none has been recognized by the ADA. Therefore, virtually every impairment that substantially limits the major life activity of working will have, in actuality, some other form of impairment at its root, such as asthma, reading, walking, writing, etc.

CONCLUSION

For the reasons discussed, defendants' motion for reconsideration is DENIED.[9]

SO ORDERED.

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[9]Because I find that defendant's motion, while perhaps in poor judgment, is not frivolous, I hereby deny plaintiff's motion for sanctions under Rule 11.

Appendix D - Notice of entry of judgment of the Court of Appeals, dated September 14 , 1998.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Carolyn Clark Campbell
Clerk

DATE: September 14, 1998

Re: Bartlett v. NYS Law Examiners

Docket No(s).: 97-9162

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Judgment was entered on September 14, 1998, and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form has been forwarded under separate cover, and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17 (8).

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours,
CAROLYN CLARK CAMPBELL, Clerk

By: s/Helena M. Harris
Helena M. Harris
Case Manager, USCA

Appendix E - Order of the Court of Appeals denying petition for rehearing with a suggestion for rehearing en banc, dated November 10, 1998.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Carolyn Clark Campbell
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10 day of November one thousand nine hundred and ninety-eight.

UNITED STATES COURT OF APPEALS
FILED: NOVEMBER 10, 1998
CAROLYN CLARK CAMPBELL, CLERK
SECOND CIRCUIT

BARTLETT

Plaintiff-Appellee,

-v- Dkt No: 97-9162

NYS LAW EXAMINERS

Defendants-Appellants

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant NYS Law Examiners.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For The Court

CAROLYN CLARK CAMPBELL, Clerk

By: s/Beth J. Meador,
BETH J. MEADOR,
Administrative Attorney

Appendix F - Pertinent statutory and regulatory provisions.

42 U.S.C. § 12102:

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12132:

Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

28 C.F.R. § 35.104:

* * *

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

* * *

28 C.F.R. Pt. 35, App. A, Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991) (excerpt):

> The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services.

29 C.F.R. § 1630, App. § 1630.2[j][2], par. 8:

> The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

45 CFR § 84.3(f):

> "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

29 U.S.C. § 794(b):

> For the purposes of this section, the term "program or activity" means all of the operations of--

* * *

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government * * * *

No. 98 – 1285

Supreme Court, U.S.
FILED
MAR 15 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1998

NEW YORK STATE BOARD OF LAW EXAMINERS; JAMES T. FULLER; JOHN E. HOLT-HARRIS, JR.; RICHARD J. BARTLETT; LAURA TAYLOR SWAIN; CHARLES T. BEECHING, JR.; and IRA P. SLOANE,

Petitioners,

–v.–

MARILYN J. BARTLETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-1285

NEW YORK STATE BOARD OF LAW EXAMINERS; JAMES T. FULLER; JOHN E. HOLT-HARRIS, JR.; RICHARD J. BARTLETT; LAURA TAYLOR SWAIN; CHARLES T. BEECHING, JR.; and IRA P. SLOANE,

Petitioners,

–v–

MARILYN J. BARTLETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Marilyn J. Bartlett ("Dr. Bartlett") respectfully requests that this Court deny the Petition for a Writ of Certiorari of Petitioners New York State Board of Law Examiners ("the Board"), James T. Fuller, John E. Holt-Harris, Jr., Richard J. Bartlett, Laura Taylor Swain, Charles T. Beeching, Jr. and Ira P. Sloane (collectively, "Petitioners").

STATEMENT OF FACTS

Dr. Bartlett respectfully incorporates by reference the facts set forth in the decision of the Court of Appeals for the Second Circuit. Pet. App. at 1a-22a[1].

SUMMARY OF ARGUMENT

In a ruling not in dispute with any of the circuit courts, the Second Circuit correctly held that Dr. Bartlett is a person with a learning disability pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. ("the ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). Petitioners wrongly compare the case at bar with cases involving radically different fact patterns and legal holdings. No circuit courts besides the Second Circuit in this case have considered the issue of learning disabilities. Similarly, no circuit courts other than the Second Circuit have considered the issue of reasonable accommodations for persons with disabilities on licensing examinations. Moreover, those courts which have held that individuals perform major life activities in a "condition, manner or duration" different from the "condition, manner or duration" of the average person have held, as did the Second Circuit herein, that those individuals have disabilities pursuant to the ADA. The cases which Petitioners rely upon to show a split in the circuits found individuals not to have a disability if "mitigating measures" were considered. These cases are inapposite to the basis of the decision because, as the Second Circuit concluded, Dr. Bartlett continues to perform in a condition, manner and duration

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[1] "Pet." refers to Petitioners' petition for certiorari, and "Pet. App." refers to the petition's appendix.

different from the average person, i.e. continues to have a disability, whether or not "mitigating measures" are considered.

In addition, the Second Circuit, following Supreme Court and circuit court precedent, correctly ruled that Petitioners had intentionally denied Dr. Bartlett's request for the reasonable accommodation of extra time in taking the New York State bar examination. Dr. Bartlett was therefore correctly awarded compensatory damages of no more than $10,000, and possibly less after remand.

The Second Circuit, following Supreme Court and circuit court precedent, determined that the New York State Board of Law Examiners was clearly a recipient of federal monies for purposes of Section 504 liability.

The Second Circuit opinion is not in conflict with any Supreme Court or circuit court cases, and Petitioners do not present any other grounds for granting the petition. The petition should therefore be denied.

REASONS FOR DENYING THE WRIT

I. *The Second Circuit's Determination that Dr. Bartlett is a Person with a Disability under the Americans with Disabilities Act is Consistent with the Language and Purpose of the Act, and the Basis for the Decision Presents No Conflict Among the Circuits*

Petitioners correctly recognize that a "disability" under the ADA exists where an impairment causes an individual to be "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life

activity as compared to the condition, manner or duration under which the average person . . . can perform that same major life actvity." 29 C.F.R. § 1630.2(j)(1)(1997). See Pet. at 11. See also 28 C.F.R. § 35.104 App. A at 470. However, Petitioners wrongly argue that Dr. Bartlett is not so restricted. Petitioners state that Dr. Bartlett can "read at a speed and in a manner comparable to that of an average person. . ." Pet. at 11. Unfortunately for Dr. Bartlett, as the Second Circuit concluded, nothing could be farther from the truth.

The Second Circuit held that "Dr. Bartlett suffers from a lack of automaticity and a phonological processing defect that significantly restricts her ability to identify timely and decode the written word, that is, to read as compared to the manner and conditions under which the average person in the general population can read or learn." Pet. App. at 15a (emphasis added). In addition, the Second Circuit cited to the District Court to conclude that "Dr. Bartlett's low 'test scores on the Woodcock, combined with clinical observations of her [slow and halting] manner of reading amply support a conclusion that she has an automaticity and a reading rate problem.' [citation omitted]." Pet. App. at 7a.[2]

The Second Circuit's conclusion was based on the District Court's finding that Dr. Bartlett "simply [did] not read in the manner of an average person." Pet. App. at 26a. Dr. Bartlett read in a slow and labored manner, Pet. App. at 43a, 51a, stumbled, re-read and self-corrected by relying on contextual

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[2] Despite Petitioners' mischaracterization, Pet. at 5, the District Court found Dr. Bartlett to be a person with a learning disability: "[t]he evidence at trial has convinced me that Marilyn Bartlett suffers from a learning deficit . . ." Pet. App. at 24a.

clues. Pet. App. at 44a, 45a. Dr. Bartlett demonstrated a reading rate at the fourth percentile (slower than 96% of college freshmen) when trying to pick up her pace, and at the first percentile (slower than 99% of college freshmen) when reading at her normal pace. Pet. App. at 47a, 50a[3]. Dr. Bartlett has decoding scores at the level of a fourth grade student, Pet. App. at 45a, a Verbal-Performance I.Q. discrepancy which is present in less that 20% of the population, an aptitude-achievement discrepancy present in less than 5% of the population, below average spelling scores, neuropsychological findings suggestive of central nervous system dysfunction, Pet. App. at 49a, including abnormally poor ability to copy figures accurately, Pet. App. at 48a, abnormally poor visual scanning, abnormally slow speed of visual tracking and equivocal laterality (developmentally below that expected of a normal 8 year old), Pet. App. at 48a, difficulty organizing visual-spatial information and difficulty with sequential processing. Pet. App. at 41a, 42a.

Notably, this description of Dr. Bartlett's disability takes into account many of Dr. Bartlett's numerous "self-accommodating techniques." As Dr. Bartlett's experts, Dr. Rosa A. Hagin and Dr. Richard F. Heath, testified at trial, as the District Court found and as the Second Circuit affirmed, while Dr. Bartlett reads, she follows the text with the finger of one hand while moving a finger of her other hand down the left margin to avoid skipping lines. Pet. App. at 44a, 49a, 51a, 54a.

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[3] Despite Petitioners' misleading statements, Pet. at 5, the District Court did not find, nor did Dr. Bartlett demonstrate at any time, that her reading rate was "average." It is, by any calculation, substantially below average. Dr. Bartlett simply cannot read automatically and thus must read slowly and deliberately in order to read accurately. Pet. App. at 7a.

In addition, she uses "subvocalization" or "verbal rehearsal" when she reads, sometimes mispronouncing words numerous times under her breath before reaching the correct pronunciation. Pet. App. at 45a, 49a, 51a[4].

Thus, the cases to which Petitioners cite to show conflict in the circuits regarding whether or not "mitigating measures" should be taken into account when assessing a disability are wholly inapposite. The plaintiffs in those cases -- Sutton v. United Air Lines, 130 F.3d 893 (10th Cir. 1997), cert. granted, __ U.S. __ (January 8, 1999) (No. 97-1943); and Murphy v. United Parcel Service, 141 F.3d 1185 (10th Cir. 1998), cert. granted, __ U.S. __ (January 8, 1999) (No. 97-1992) -- were found not to have a disability if "mitigating measures" were considered. The eyeglasses of the Sutton plaintiffs and the hypertension medication of the Murphy plaintiff made those

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[4] The record demonstrates that throughout her life, Dr. Bartlett also relied on such "self-accommodations" as arranging with friends and family to read her texts to her, District Court Transcript ("Tr.") at 832, Second Circuit Joint Appendix ("JA") at 406-7, 418-9, using an index card with a rectangular hole cut in it to stop her eyes from jumping from one line of text to another mid-sentence, JA at 418, 289, 296, and taking "paper" courses to avoid timed tests wherever possible. JA at 406-7, 409. She also relied on personal attributes such as determination, creativity and perseverance to lessen the effects of her disability as much as possible. As this Court recognized, such "self-accommodations" do not obviate the disability. Bragdon v. Abbott, 118 S. Ct. 2196, 2206 (1998) ("In the end, the disability definition does not turn on personal choice.")

In addition, the Woodcock test which is untimed and which Petitioners used to assess Dr. Bartlett's disability, effectively provided Dr. Bartlett with the necessary accommodation of extra time. It is therefore incapable of measuring her disability or her need for the requested accommodation of extended time.

plaintiffs "normal" – i.e. just like the average person. For Dr. Bartlett, none of her self-accommodations eliminate or cure her disabling condition or permit her to read, write or learn in the same condition, manner or duration as adults without this disability. No medication will permit Dr. Bartlett to read at an average rate or like the average person. No eyeglasses or other device will permit her to read at an average rate or like the average person.

The issue of "mitigating measures" is thus irrelevant to the basis of the Second Circuit opinion because with or without "mitigating measures," Dr. Bartlett reads, writes and learns in a different condition, manner and duration than the average person. The Second Circuit was thus correct to conclude that Dr. Bartlett's "history of self-accommodations, while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population, 'do not take [her] outside of the protective provisions of the ADA,' [cite omitted], especially where, as here, the dispositive measure [used to deny her request for extra time on the bar examination] is the Woodcock, a test that allowed her unlimited time to compensate for her disability, and a test that cannot measure automaticity directly." Pet. App. at 16a[5].

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[5] Dr. Bartlett's circumstances also differ from those of the plaintiff in another case to which this Court also recently granted certiorari, Albertson's, Inc. v. Kirkingburg, 143 F.3d 1228 (9th Cir. 1998), cert. granted, __ U.S. __ (January 8, 1999) (No. 98-591). In that case, the Ninth Circuit held that the plaintiff, a person with essentially monocular vision, was protected by the ADA. Kirkingburg's vision in his one good eye is normal. His brain's "subconscious adjustments" assist him in perception and peripheral vision, so that he qualified for the U.S. Department of Transportation's vision waiver without the assistance of any mechanisms or devices. 143 F.3d at 1231-2. Dr. Bartlett's brain has not performed

The Second Circuit opinion is also in keeping with the most recent articulation by this Court of the definition of disability. In Bragdon v. Abbott, 118 S. Ct. 2196 (1998), this Court pronounced that the ADA "addresses substantial limitations on major life activities, not utter inabilities. . . . When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." Id. at 2206[6].

Because Petitioners fail to show any conflicts with Supreme Court or circuit court cases, or any other grounds for granting certiorari, Petitioners' writ should be denied.

"subconscious adjustments" which permit her to function normally. She has merely behaviorally adjusted her conduct and activities so as to lessen the impact of her disability as much as possible. Under no set of circumstances would her learning disability be controlled, or correctable, or go unnoticed due to "subconscious brain adjustments."

The case at bar is also distinguishable from Murphy, Sutton and Kirkingburg in that it alone of all circuit cases deals with learning disabilities, and it alone deals with accommodations on licensing exams. There are clearly no conflicts in the circuit courts on these matters as no circuit courts have dealt with them.

[6] Moreover, contrary to Petitioners' dire predictions of ills to befall society if the ADA and 504 disability definition is interpreted broadly, the Bragdon decision underscores that such an interpretation does not come at the expense of public accommodations, government entities or employers. These entities are not unduly exposed to liability since individuals who may be found to have disabilities under a broad definition must still be qualified for the job or other service. See, e.g., 42 U.S.C. §§ 12111(8), 12112(a). In addition, if accommodations are required, they must only be provided where they are reasonable in light of the costs and other burdens they impose. See, e.g., 42 U.S.C. §§ 12111(9), (10).

II. *The Second Circuit's Determination Regarding Compensatory Damages is Consistent with Supreme Court and Circuit Court Precedents*

By grossly mischaracterizing case law, Petitioners conclude that the Second Circuit "ignored the standards set forth in Guardians Association, Ferguson, and Gebser . . ." Pet. at 15. In fact, the Second Circuit's holding that Petitioners evinced intentional discrimination by acting with deliberate indifference to Dr. Bartlett, is in keeping with these cases and all Supreme Court and circuit court cases that have considered this issue.

As Petitioners themselves recognize, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq., was the model for Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, et seq. Pet. at 16 citing Canutillo Independent School District v. Leija, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997). See also Grove City College v. Bell, 465 U.S. 555, 566 (1984). Section 504 references Title VI with respect to available relief, 29 U.S.C. § 794a(a)(2), and the ADA references Section 504 in this regard. 42 U.S.C. § 12133. Thus, the most recent relevant articulation by this Court of Section 504 and ADA damages standards was in Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998). In Gebser, this Court held that compensatory damages are available in Title IX cases upon a showing of discriminatory intent as manifested by deliberate indifference. 118 S. Ct. at 1999 ("a damages remedy . . . under Title IX . . . [requires that] an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond. . . .

[T]he response must amount to deliberate indifference to discrimination.").

The Second Circuit's decision regarding compensatory damages is in perfect conformance with Gebser. The Second Circuit held that Dr. Bartlett had "met her burden of proving discriminatory intent" under the ADA and Section 504, Pet. App. at 19a, and held that the Board's policy regarding accommodating bar applicants with learning disabilities "constituted deliberate indifference to a strong likelihood of violating Dr. Bartlett's federally protected rights." Pet. App. at 20a (emphasis added)[7].

The circuit cases cited by Petitioners are also not in conflict with the Second Circuit's holding. Contrary to Petitioners' outright mischaracterizations, the courts in Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998), Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992) and Carter v. Orleans Parish Public Schools, 725 F.2d 261 (5th Cir. 1984) all held that, under Section 504, compensatory damages are available upon a showing of discriminatory intent -- precisely what the Second

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[7] Contrary to Petitioners' assertions, Gebser is not a departure from previous rulings of this Court regarding compensatory damages, and no "clarification" of a "conflict" is warranted. In Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74 (1992), this Court held that, in the context of Title IX cases, compensatory damages are available for an intentional violation. Pet. App at 19a. Similarly, this Court held in Guardians Ass'n v. Civil Service Comm'n of the City of New York, 463 U.S. 582 (1983), that compensatory damages in a Title VI action are available upon a showing of intentional discrimination, if not also for unintentional discrimination.

Circuit held[8]. The other Circuits which have ruled on this issue are likewise in agreement with the Second Circuit. See, e.g., Tyler v. City of Manhattan, 118 F.3d 1400, 1406 (10th Cir. 1997) (holding that compensatory damages are available under Title II of the ADA upon a showing of intentional discrimination and citing Oxford House-C. v. City of St. Louis, 843 F.Supp. 1556, 1577 (E.D. Mo. 1994) to the effect that intentional discrimination against persons with disabilities "'does not require personal animosity or ill will'"); Moreno v. Consolidated Rail Corp., 99 F.3d 782, 789 (6th Cir. 1996) (noting that every circuit that has reached the issue after Franklin has held that compensatory damages are available under Section 504); Pandazides v. Virginia Bd. of Education, 13 F.3d 823, 830 (4th Cir. 1994) (compensatory damages available under Section 504 for intentional discrimination, but no need to show discriminatory animus); J.L. v. Social Security Administration, 971 F.2d 260 (9th Cir. 1992) (same); Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103 (9th Cir. 1987) (same)[9].

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[8] In fact, the Ninth Circuit in Ferguson cited approvingly to Gebser, 157 F.3d at 674. Moreover, even if the Ninth Circuit misinterpreted Supreme Court precedent, there is no reason to grant certiorari in this case where the Second Circuit correctly interpreted Supreme Court precedent.

[9] See also Alexander v. Choate, 469 U.S. 287, 295-297 (1985) ("[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect. . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus. . . . [M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.").

Petitioners' contention that the Second Circuit "disregarded the district court's findings of fact" regarding the awarding of compensatory damages, Pet. at 17, is both incorrect[10] and irrelevant to their Petition. The District Courts' finding of fact that the Board "intentionally withheld from plaintiff an accommodation to which this Court has deemed she was entitled," Pet. App. at 140a (emphasis in original), see also Pet. App. at 145a (same), was the basis of the District Court's holding that Petitioners intentionally violated the ADA and Section 504, and the basis for the Second Circuit's affirmance. Pet. App. at 20a[11]. Moreover, an appellate court's purported

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[10] Petitioners seek to mislead this Court by arguing that the District Court found the views of Petitioners' expert, Dr. Vellutino, to be "perfectly rational." Pet. at 17. In fact, this view was expressed by the District Court in the context of its ruling on Dr. Bartlett's Equal Protection and 42 U.S.C. § 1983 claims, and referred to the Board members individually, not the Board as an entity. Petitioners conveniently ignore the District Court's finding in the context of Dr. Bartlett's ADA and Section 504 claims that Dr. Vellutino's views were "seriously infirm." Pet. App. at 59a, 60a.

[11] Contrary to Petitioners' claims, the District Court solidly backed up its holding of intentional discrimination, as did the Second Circuit in affirming that holding. The Board clearly had "actual knowledge of discrimination" and "fail[ed] adequately to respond" and thus met the Gebser deliberate indifference standard. As the Second Circuit held, the most obvious indication that Petitioners knew their actions were discriminatory yet failed to act is the fact that Petitioners used an untimed learning disabilities test (the Woodcock Word Attack and Word Identification subtests) to ascertain whether Dr. Bartlett had a disability, while the bar examination they administer is timed and Dr. Bartlett sought the accommodation of extra time. Pet. App. at 20a. In addition, the Second Circuit noted that, even in studies upon which Petitioners relied as support for their cutoff score on the Woodcock, one third of adults who have learning disabilities scored above the cutoff. Id. The Second Circuit thus held that the Woodcock tests were "unreliable" and that use of the tests "constituted deliberate indifference." Id. Citing directly to the District

errors in interpreting the district court's finding of facts is not an appropriate subject for Supreme Court review. Ross v. Moffitt, 417 U.S. 600, 616-617 (1974).

Court opinion, the Second Circuit noted that the court had found

> (a) the Woodcock could not measure Dr. Bartlett's lack of 'automaticity,' i.e., her ability to recognize a printed word and read it accurately and immediately without thinking; (b) the Woodcock was not timed and thus could not measure the slowness of reading – an important characteristic of adult dyslexics like Dr. Bartlett, who, on other tests, had demonstrated a reading rate comparable to the bottom fourth percentile of college freshman when timed; (c) the Woodcock was designed to principally assess children and did not have enough items in the difficult range; and (d) Dr. Bartlett's Woodcock results exhibited discrepancies, revealing high reading comprehension scores in comparison to low, but average, Word Attack and Word Identification scores. See id. at 1114. Furthermore, the district court found that use of a 30th percentile cutoff by Petitioners' expert, Dr. Frank Vellutino, was arbitrary and flawed because other studies demonstrated that one third of adults with dyslexia scored above that percentile on similar tests. See id.

Pet. App. at 6a-7a.

The record amply demonstrates that the Board was indeed aware of the myriad faults of their screening device for persons with learning disabilities:

• The District Court found that, after having been asked by the Board to develop a mechanism for their use which did not incorporate accepted clinical practice, Tr. at 2392, Dr. Vellutino informed Petitioners that the 30th percentile cutoff was arbitrary and, like any cutoff, inherently flawed. Pet App. at 55a, 126a-128a. See also, Pet. App. at 59a-61a. Moreover, Dr. Vellutino informed Petitioners that its use would lead to accommodating those without learning disabilities while denying accommodations to a

Because Petitioners fail to show any conflicts with Supreme Court or circuit court cases, or any other grounds for granting certiorari, Petitioners' writ should be denied.

III. *The Second Circuit's Determination Regarding the Applicability of Section 504 of the Rehabilitation Act is Consistent with Supreme Court and Circuit Court Precedents.*

The Second Circuit correctly held, consistent with Supreme Court precedent and the plain language of the statute,

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number of individuals with learning disabilities. Tr. at 2395, 2401. Dr. Vellutino recommended to Petitioners in 1987 that they not utilize the Woodcock as a screening device because it was "pointless," Tr. at 1998, and because it could not determine who lacks automaticity. Tr. at 2305. He also informed Petitioners that permitting extended time to take the examination would not compromise Petitioners' purposes. Tr. at 2002. See also Pet. App. at 126a-128a. Both Dr. Vellutino and Petitioners acknowledged that the Woodcock was inconsistently applied because the review process was "catch as catch can," Tr. at 2223, 2044, and the "luck of the draw." Tr. at 2144. Thus, the District Court noted that "the best evidence of the Woodcock's shortcomings comes from defendants' experts and the scientific evidence upon which they rely." Pet. App. at 59a.

• Petitioners were aware that their approach to screening applicants was not used elsewhere. Pet. App. at 126a-128a; Tr. at 1882-3, 880-1.

• The unsuitability of the Woodcock was further brought to Petitioners attention in January 1992 when they were sued for discrimination against a person with learning disabilities. Rosenthal v. New York State Board of Law Examiners, 92 Civ. 1100 (S.D.N.Y. 1992). The U.S. Department of Justice submitted a strongly worded amicus brief in support of the plaintiff in Rosenthal, advising Petitioners that their method of assessing whether individuals had learning disabilities violated the ADA. Later that year, the Justice Department also commenced a formal investigation of the Board's policies regarding applicants with disabilities.

that Section 504 was applicable to the Board as the Board was a recipient of federal funds. Pet. App. 16a-18a.

Incredibly, Petitioners admit that federal Rehabilitation Act monies are given to them from other state agencies which pay for the exam fee of applicants with disabilities, Pet. at 23-24, but argue that, nonetheless, they are not a "recipient" of federal assistance for purposes of Section 504 applicability, and suggest that they are mere "beneficiaries" of federal monies. Pet. at 21-25.[12]

Section 504, which was amended in 1988, prohibits discrimination against persons with disabilities by "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The term "program or activity" is defined as:

> all of the operations of–
>
> > (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> >
> > (B) the entity of such State or local government that distributes such assistance

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[12] Notably, Petitioners argued to the Second Circuit that they were not beneficiaries. Petitioners' Brief to the Second Circuit at 7-8. See also Pet. App. at 18a (the Second Circuit's response to Petitioners' argument regarding benefitting from the federal monies).

Unlike the airlines in U.S. Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986) which did not actually receive any money and were thus found to be mere beneficiaries, there is no disputing that the Board actually received federal monies.

> and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a state or local government.

29 U.S.C. § 794(b) (emphasis added)[13].

Because Petitioners are a state entity, and because they have admitted that they receive federal money from two other state entities -- the New York State Department of Education, Office of Vocational and Educational Services for Individuals with Disabilities ("VESID") and the New York State Department of Social Services Commission for the Blind and Visually Handicapped ("CBVH") -- the Second Circuit correctly concluded, pursuant to the plain language of the statute, that the Board is a "department or agency" to which the federal "assistance" is "extended."

Moreover, the Second Circuit specifically applied that statute and U.S. Supreme Court precedent in recognizing that "[t]here is neither a requirement that a state entity directly receive federal financial assistance, see Grove City College v. Bell, 465 U.S. 555, 564, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984)[14], nor that it directly benefit from that assistance, see

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[13] Similarly, regulations promulgated under Section 504 define a "recipient" as including "any instrumentality of a state . . . to which Federal financial assistance is extended directly or through another recipient." 34 C.F.R. § 104.3(f) (emphasis added).

[14] The VESID and CBVH funds which the Board receives are akin to the "indirect" federal financial aid which students in Grove City received. This Court held that receipt of such funds established a sufficient nexus to

Paralyzed Veterans, 477 U.S. at 607, 106 S.Ct. 2705 (citing Grove City)." Pet. App. at 17a (emphasis in original). In addition, the Second Circuit's conclusion regarding indirect receipt of funds is supported by at least three circuit courts, with no circuit courts opposing it. See Moreno v. Consolidated Rail Corp., 99 F.3d 782, 787 (6th Cir. 1996) (where entity received federal monies, albeit indirectly, it was a "recipient" of federal funds); Thomlison v. City of Omaha, 63 F.3d 786, 789 (8th Cir. 1995) (same); Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991) (quoting legislative history of Section 504 regarding indirect receipt of federal funds). Similarly, the Second Circuit's conclusion regarding benefitting from the federal assistance is shared by at least two circuits, with no circuits offering a contrary voice. See Bob Jones University v. Johnson, 396 F. Supp. 597, 603 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (ascertaining whether an entity has received federal assistance "does not depend . . . upon a showing that the university has reaped a financial gain. . ."); Moreno v. Consolidated Rail Corp., 99 F.3d at 787 (argument that entity was not a "recipient" since it "receives no benefit for which it does not reimburse the state" was "not . . . persuasive")[15].

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consider the relevant part of Grove City College to be a recipient of federal funds, as this Court held that there was no difference between direct institutional assistance and indirect aid received by a school through its students. Id. at 564.

[15] In addition, the Fifth Circuit held that where an entity that receives federal money is not the ultimate beneficiary of the money, the entity is a "recipient" for Section 504 purposes. U.S. v. Baylor University Medical Center, 564 F. Supp. 1495 (D. Tx. 1983), aff'd, modified and vacated in part on other grounds, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985)(university that received federal Medicare and Medicaid money which was for the ultimate benefit of patients was a 504 "recipient"). The ultimate beneficiary of the federal monies the Board receives is similarly not

In addition, to the extent that such an analysis is still required after the 1988 amendments to Section 504[16], the Second Circuit decision is in conformance with the holding in Paralyzed Veterans that federal fund "recipient" status is based upon being "in a position to accept or reject . . . [the Section 504] obligations as a part of the decision whether or not to 'receive' federal funds." 477 U.S. at 606. The Second Circuit did not disturb the District Court finding that the State and the Board "could refuse the federal programs that require them to accept payment of an applicant's fee from the federal government." Pet. App. 71a[17].

It should also be noted that a determination by this Court of the applicability of Section 504 may not alter the outcome of the case, and if it does alter it, it would only be with respect to

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the Board, but rather the bar exam applicants with disabilities.

[16] After analyzing the 1988 amendments, the Second Circuit noted that "[n]either the statute nor the regulations require an analysis of whether the instrumentality of a state to which the assistance is 'extended,' must also be in a position to accept or reject § 504 obligations for the strictures of the Rehabilitation Act to apply." Pet. App. at 18a.

[17] The facts of this case are radically different from those in National Collegiate Athletic Association v. Smith, __U.S.__, 1999 U.S. LEXIS 1511 (1999). This Court found that the National Collegiate Athletic Association ("NCAA"), a private organization, was not a recipient of federal funds, despite the fact that some of its members received federal funds, because it was not clear whether their dues were paid with federal funds. 1999 U.S. LEXIS 1511 at *17. The NCAA was thus found not to have received federal assistance but merely to have benefitted from the assistance. Id. The Board, on the other hand, is a state agency that receives money from two state agencies and that money is clearly designated as federal money. Pet. App. at 70a; Tr. 65, 82-3. The Board is thus in actual receipt of federal money, as opposed to merely benefitting from it.

the damages amount -- no more than $2,500, the damages awarded for one bar examination. Section 504 was concurrently applicable with the ADA for four out of the five administrations of the bar examination for which Petitioners refused to appropriately accommodate Dr. Bartlett, and the issue of compensatory damages for the one examination for which Section 504 alone is applicable was remanded to the District Court. Thus, even if this Court were to determine the issue of Section 504 applicability, Petitioners would continue to be held liable to Dr. Bartlett under the ADA.

As Petitioners have not demonstrated that there is any conflict between the Second Circuit's decision and this Court's precedents, and have not demonstrated any other ground for granting certiorari, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 98-1285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NEW YORK STATE BOARD OF LAW EXAMINERS, JAMES T. FULLER, JOHN E. HOLT-HARRIS, JR., RICHARD J. BARTLETT, LAURA TAYLOR SWAIN, CHARLES T. BEECHING, JR. and IRA P. SLOANE,

Petitioners,

v.

MARILYN J. BARTLETT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL CONFERENCE OF BAR EXAMINERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This case involves the decision of a state licensing board to deny testing accommodations requested by a prospective examinee. The board's decision was based upon an evaluation of the examinee's disability documentation by a third-party expert. Three questions are presented in the Petition for a Writ of Certiorari. This *amicus* brief, however, addresses only the second question presented by the Petitioners.*

The question addressed here is whether, in conflict with decisions of the Fifth, Eighth, Ninth and Eleventh Circuits, the Court of Appeals for the Second Circuit erred in concluding that a defendant can be held liable for compensatory damages under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, absent a finding of bad faith, discriminatory animus, gross misjudgment, or knowledge of improper conduct.

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* The third question addressed in the Petition relates to the scope of the Rehabilitation Act, which applies to recipients of "federal financial assistance." Although not addressed in this brief, that question appears to implicate the Court's recent decision in *National Collegiate Athletic Ass'n v. Smith*, 67 U.S.L.W. 4130 (Feb. 23, 1999), decided after the filing of the Petition in this case.

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Cited Authorities

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Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) 17

Cited Authorities

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Standards for Educational and Psychological Testing (1991 ed.) (published by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education) 10

INTEREST OF *AMICUS CURIAE*

With the written consent of all parties, the National Conference of Bar Examiners ("NCBE") respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.[1]

Founded in 1931, the NCBE is an independent, non-profit corporation whose broad purpose is to assist in the process by which individuals are admitted to practice law in the various states and the District of Columbia. In furtherance of this purpose, the NCBE provides development, research and support services to boards or committees of bar examiners (referred to herein as "Boards") who regulate the bar admissions in their respective jurisdictions.

Of relevance here, the NCBE provides high quality standardized examinations that jurisdictions can use as part of their bar examination process. The most widely used examination developed by the NCBE is the Multistate Bar Examination ("MBE"), a multiple choice examination currently used in 52 jurisdictions, including New York. The NCBE also develops the Multistate Essay Examination ("MEE") (used in 13 jurisdictions), the Multistate Professional Responsibility Examination ("MPRE") (used in 52 jurisdictions), and the Multistate Performance Test ("MPT") (used in 18 jurisdictions). With the exception of the MPRE, which the NCBE administers, these examinations are administered by the Boards in each of the user jurisdictions.

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1. NCBE's counsel hereby confirm that they wholly authored this brief and that no person or entity other than the NCBE has made any monetary contribution to the brief's preparation or submission.

Title III of the Americans with Disabilities Act (the "ADA") requires, in relevant part, that any

> person that offers examinations or courses related to applications, licensing, certification or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. § 12189. Title III thus applies to the NCBE.

Title II of the ADA prohibits "public entities" from discriminating against disabled individuals with respect to the public entities' services, programs and activities. 42 U.S.C. § 12132. Title II thus applies to the New York State Board of Law Examiners (the "New York Board" or the "Board"). If a Board receives federal financial assistance, it might also be subject to Section 504 of the Rehabilitation Act, which prohibits disability discrimination by recipients of such financial assistance. 29 U.S.C. § 794.[2]

The ADA was modeled after Section 504 of the Rehabilitation Act. The relevant standards for determining whether disability discrimination has occurred are essentially the same under both statutes. *See* 42 U.S.C. § 12133; *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 2202 (1998).

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2. The NCBE is not governed by Title II of the ADA because it is a private corporation. It is not governed by the Rehabilitation Act because it does not receive federal financial assistance.

In 1998, the NCBE administered the MPRE to 68,232 bar applicants. The NCBE provided disability-related accommodations to 531 of those applicants, 299 of whom had cognitive/mental impairments. The NCBE thus has a significant interest in how the ADA is interpreted and applied with respect to bar examinations. This interest is direct in the case of the MPRE, which the NCBE administers, and indirect, but no less substantial, in the case of the MBE and the other NCBE examinations which Boards administer in user jurisdictions.

In the present case, the United States Court of Appeals for the Second Circuit held, among other things, that even if a testing agency hires an acknowledged expert and uses reasonable and acceptable methods for determining, in good faith, whether an individual examinee has a learning disability requiring testing accommodations, the testing agency can still be held liable for intentional discrimination, and therefore compensatory damages, if a court later determines, based on conflicting expert testimony, that the examinee did, in fact, have a learning disability. App. 19a-20a. The Second Circuit's standard for intentional discrimination conflicts with decisions of the Fifth, Eighth, Ninth and Eleventh Circuits and creates the equivalent of strict liability for violations of the federal disability laws. It places state boards of bar examiners and testing organizations such as the NCBE in an untenable position, while doing little or nothing to further the purposes of the federal disability statutes.

During the years 1992 through 1993, the New York Board received 109 requests for testing accommodations from individuals who stated that they have learning disabilities. The Board granted 84 of those requests and denied 25, one of which was Ms. Bartlett's. The possibility of even a handful

of those 25 denials resulting in litigation, despite the Board's best efforts both to comply faithfully with federal law and to maintain the integrity of its examinations, is a very disturbing prospect. Moreover, New York is but one jurisdiction, and the numbers referenced above relate to only a two-year period. Other jurisdictions are in a similar position. The Second Circuit's opinion therefore significantly increases the risk of litigation for all jurisdictions if they deny accommodations.[3] It also creates conflicting standards among the circuits. Given the importance of the issue to state licensing boards such as the New York Board, and to testing organizations such as the NCBE, the NCBE respectfully presents its views to the Court.

FACTS

The New York Board denied Ms. Bartlett's request for testing accommodations on the July 1993 bar examination only after reviewing, in good faith, the documentation that she provided in support of her request, and only after obtaining the advice of an independent expert consultant on learning disabilities, Dr. Frank Vellutino. App. 35a. As the district court acknowledged, Dr. Vellutino is a "research psychologist expert in the field of learning disabilities." App. 52a. He has "published numerous books and articles on the subject," he is a Professor in the Department of Educational Psychology and Statistics at the State University of New York at Albany, and he "supervises a clinic engaged in the

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3. *Cf. Hoover v. Ronwin*, 466 U.S. 558, 580-81 n.34 (1984) (noting, in a Sherman Act case, the untoward "discovery and litigation burdens" that would result for bar "examining boards and committees" if the lower court's decision were to be affirmed, and stating that, "every year, there are thousands of aspirants who, like Ronwin, are disappointed" when they fail a bar examination).

identification and treatment of children with dyslexia." *Id.* Dr. Vellutino utilized a method of evaluating an applicant's need for accommodation that was purposefully overinclusive in identifying those individuals with learning disabilities. App. 55a. Based on his methodology, he concluded that Ms. Bartlett was not an individual who needed testing accommodations. App. 56a.

After her initial request for testing accommodations was denied, Ms. Bartlett asked the Board to reconsider, and she submitted additional documentation. App. 35a. The Board considered the new documentation and also forwarded it to Dr. Vellutino. Based upon his evaluation, the Board denied Ms. Bartlett's appeal. App. 35a-36a. Ms. Bartlett then commenced the instant action in the United States District Court for the Southern District of New York claiming, among other things, that the Board's denial of her request for accommodations in taking the bar examination violated Title II of the ADA and Section 504 of the Rehabilitation Act. App. 24a.

A score of 660 is needed to pass the New York bar examination. App. 27a-28a. Ms. Bartlett has taken (and failed) the New York bar examination five times, achieving scores between 563 and 615. App. 33a, 35a, 36a. Ms. Bartlett was not provided with any testing accommodations the first four times that she took the New York examination (she did not request any accommodations on at least one of the examinations, and perhaps two). App. 33a-35a. On her fifth try, however, Ms. Bartlett was given testing accommodations pursuant to a stipulated preliminary injunction entered in this case. App. 36a. She again failed, achieving a lower score (597) than she had achieved on the February 1993 examination without accommodations (615). App. 35a-36a.

Ms. Bartlett also took the Pennsylvania bar examination in July 1993. App. 37a. Although she was provided testing accommodations, she also failed this examination. *Id.*

Despite her poor performance on the two bar examinations administered to her with special accommodations, Ms. Bartlett persisted in her claims against the Board and her lawsuit proceeded to trial. After a three week trial which included conflicting expert testimony and "exhibits and briefs aggregating to more than 5000 pages," the district court concluded that the Board violated the ADA and the Rehabilitation Act. App. 24a, 58a. In analyzing Ms. Bartlett's Equal Protection Claim and the individual defendants' claim of qualified immunity, however, the district court concluded that

> the Board's procedures, including the subjection of applicants' reports to review by an expert, are rationally related to the legitimate government end of discerning whom should be afforded accommodations on the state bar examination.

App. 110a; *see also* App. 112a ("Clearly, . . . it is not irrational for the Board to use an expert to assist in the evaluation of [an applicant's] reports. Likewise, the choice of Dr. Vellutino as that expert was perfectly rational, as were Dr. Vellutino's theories."). The district court further found that: (1) the Board and its expert employed a reasonable methodology to determine whether Bartlett was learning disabled; (2) the individual defendants acted reasonably "when they determined that plaintiff was not disabled under the law;" (3) "a reasonable defendant would not have understood that his or her acts were unlawful;" (4) "[d]efendants seemingly made an attempt to comply with the

statutes;" and (5) that any resulting bias against learning disabled applicants generally, or the plaintiff specifically, was unintentional. App. 109a, 111a-112a, 132a-133a. Nonetheless, the district court held that the Board had committed an ***intentional*** violation of the ADA and the Rehabilitation Act, and it awarded Ms. Bartlett $12,500 in compensatory damages. App. 140a-141a.

On appeal, the Second Circuit concluded that the Board's decision was entitled to no deference. App. 9a-11a. It affirmed the award of damages but remanded the case for a final determination of the amount. App. 19a-20a. Acknowledging that an award of compensatory damages requires a finding of intentional discrimination, the Second Circuit went on to hold that "intentional discrimination against the disabled does not require personal animosity or ill will. . . ." App. 19a-20a. Rather, the Second Circuit concluded, intentional discrimination "may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy." App. 20a (quotations and citations omitted). Discounting (if not ignoring) the district court's findings regarding the reasonableness and good faith of the Board's actions, the Second Circuit concluded that because the trial court ultimately found that the Board's methodology for identifying individuals with learning disabilities was flawed, the Board's denials of Ms. Bartlett's accommodation requests amounted to "intentional discrimination." App. 20a. This petition follows.

REASONS FOR GRANTING THE WRIT

This case creates a conflict among the circuits regarding the correct standard for an award of compensatory damages under Title II of the ADA and the Rehabilitation Act. In the Fifth, Eighth, Ninth and Eleventh Circuits, a plaintiff cannot recover compensatory damages under Title II of the ADA or under the Rehabilitation Act absent a finding of bad faith, gross misjudgment, or discriminatory animus, or a knowing failure to correct improper discrimination. Deviating from these decisions, the Second Circuit effectively held in this case that a defendant will be liable for compensatory damages under Title II of the ADA or the Rehabilitation Act, regardless of the reasonableness or good faith of its actions or the lack of any discriminatory animus, so long as the defendant knowingly acted in a manner that is ultimately found, at trial, to violate the statutes. Because of the importance of this issue to individuals and entities which, every year, must make good faith judgments about the disabilities of thousands of individuals and their need for accommodation, the Court should grant certiorari to resolve this conflict.

I.

THE ISSUE HAS WIDESPREAD SIGNIFICANCE.

While the present case involves one individual who took one kind of examination, the issues raised in the New York Board's petition have far broader implications. Hundreds of thousands of examinations are administered each year by or for a broad range of state licensing or certification boards. Individuals who want to become lawyers, doctors, nurses, engineers, social workers, dentists, accountants, or architects, for example, must obtain licenses before they can lawfully practice, and the licensing process for all of those professions

requires completion of one or more examinations. Likewise, in the educational context, hundreds of thousands of individuals take admissions examinations every year, such as the SAT or the ACT Assessment; the Law School Admissions Test ("LSAT"); the Medical College Admissions Test ("MCAT"); and the Graduate Record Exam ("GRE").

In both contexts, professional licensing and admissions to educational institutions, as well as in other contexts in which examinations are used, thousands of test takers request testing accommodations each year based upon claimed disabilities. Most of the requests are properly documented, and most accommodations are routinely provided.

The ADA and the Rehabilitation Act define the term "disability" in terms of "physical" and "mental" impairments. *See* 29 U.S.C. § 705(20); 42 U.S.C. § 12102(2). Relatively speaking, accommodation requests involving physical impairments have not been difficult to evaluate or particularly controversial. But an increasingly large number of testing accommodation requests involve mental impairments, such as dyslexia, attention deficit disorders, dyscalcula, the "disorder of written expression," other learning or cognitive disabilities, and even "test anxiety."[4] These requests generally

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4. Between 1990 and 1993, for example, the number of learning disabled individuals taking the LSAT under special conditions (usually consisting of time extensions) increased by over 100 percent, from 261 to 553. In the 1994-95 testing year, [there were] 785 requests from learning disabled individuals for similar accommodations.

L. Eichhorn, "Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context," 26 J. of Law & Educ. 31 (1997).

pose greater challenges, both in terms of properly documenting the disability and determining what accommodations are appropriate. The accommodations requested for mental disabilities include extended testing time; readers; scribes; calculators; changed testing formats (*e.g.*, essay rather than multiple choice); additional rest periods; separate testing rooms; a change in the grading process; and, in at least one case, modification of standardized exam questions so they are more "simple" and "direct."[5]

"Diploma tests and licensure tests are designed to protect the public from those who have not mastered minimum skills." S.E. Phillips, "High Stakes Testings Accommodations: Validity Versus Disabled Rights," *Applied Measurement in Education*, 7(2), 93-120 at 98 (1994). When a given test taker asks for testing accommodations that are not available to other test takers, the question arises whether "scores with and without accommodations are comparable. That is, do scores from nonstandard administrations have the same meaning as scores from standard administrations?" *Id.* at 96; *see also Standards for Educational and Psychological Testing* at 78 (1991 ed.) (published by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education). A request for accommodations

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5. *See* Petition for Damages and Injunctive Relief ¶ 6, *Jones v. American Council on Educ.*, No. 98-592-A-M2 (M.D. La.) (filed June 30, 1998) (ADA suit brought by an individual who claimed to suffer from "attention deficit, dyslexia, dysgraphia, discalcula, a short attention span and inability to process sequential information and instructions;" the individual was provided some but not all of his requested accommodations when he took the General Educational Development tests, the successful completion of which is recognized in certain states as the equivalent of a high school diploma).

thus raises fairness issues not only for the individual who has requested the accommodations, but also for the many individuals and entities who rely upon the validity of the examination as an accurate measure of what it is designed to assess.[6] It also raises fairness issues for other test takers who do not get such accommodations and who might suffer a tangible loss — such as admission to a college or to a state's bar — if the accommodated individual obtains an inappropriate advantage by virtue of the accommodations.

For these reasons, licensing boards and testing organizations have a responsibility to ensure that testing accommodations are provided to all individuals with qualifying disabilities, but not to individuals who do not have, or do not properly document, such disabilities. Necessarily and appropriately, they must balance competing interests. This is especially true in the licensing context, where the decision regarding the appropriateness of testing accommodations is made for purposes of protecting the

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6. *See generally* Note, "Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act," 111 Harv. L. Rev. 1560, 1562, 1573 (1998) (arguing that "decisional models that focus on balancing the interests of individuals and institutions . . . are most consistent with the ADA's vision of reasonable equality," and noting that "many experts in the field recognize the problematic nature of the LD category — a broadly heterogenous classification with disputed etiology. . . ."); Note, "Learning and Mental Disability Protection Under the Americans with Disabilities Act in the Quest for Certification for the Practice of Law," 10 J. Law & Health 209, 227-28 (1995/1996) (noting the potential for conflict between a disabled individual's request for accommodations and the "vital function of the certification process — to screen applicants for competency and fitness to practice law," and stating that ADA challenges are "shift[ing] the focus to fear of litigation").

public, not for self-interested reasons. *See, e.g.*, *Theriault v. Flynn*, 162 F.3d 46, 50 (1st Cir. 1998); *Jacobsen v. Tillman*, 17 F. Supp. 2d 1018, 1024 (D. Minn. 1998); *Price v. National Bd. of Medical Examiners*, 966 F. Supp. 419, 421-22 (S.D. W.Va. 1997); *Ramachandar v. Sobol*, 838 F. Supp. 100, 108 (S.D.N.Y. 1993).

The present case involves New York's licensing process for lawyers. This Court has recognized that "important state interests" are implicated by a state's regulation of "persons who are authorized to practice law." *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431-34 (1982). The issue presented here has significant implications with regard to those state interests and deserves consideration by the Court.

II.

THE SECOND CIRCUIT'S STANDARD FOR IMPOSING COMPENSATORY DAMAGES CONFLICTS WITH DECISIONS FROM THE FIFTH, EIGHTH, NINTH AND ELEVENTH CIRCUITS.

An award of compensatory damages under Title II of the ADA and Section 504 of the Rehabilitation Act requires a finding of "intentional discrimination." *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983) (Title VI of the Civil Rights Act of 1964 — whose remedial scheme is adopted under Title II of the ADA and under the Rehabilitation Act — requires a finding of intentional discrimination before compensatory damages may be awarded). While the Second Circuit referenced this requirement, its holding as to what conduct suffices to support

a finding of "intentional discrimination" conflicts with decisions from at least four other Circuits.

In *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983), the Fifth Circuit held that

> when a school district, in good faith attempts to provide a free appropriate public education to a handicapped child and has adequately complied with the procedures for determining the child's correct educational placement, it will not later stand liable to the parents for damages even if a court subsequently determines that the educational placement was incorrect.

Later, in *Carter v. Orleans Parish Pub. Schs.*, 725 F.2d 261, 264 (5th Cir. 1984), the Fifth Circuit emphasized that absent some allegation that the defendant school board "intended to place his children in inappropriate classes or that his children's placement manifested discriminatory animus," damages for a violation of Section 504 of the Rehabilitation Act would not lie.

In *Monahan v. State of Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983), the Eighth Circuit held, in the context of education of disabled children, that "either bad faith or gross misjudgment" must be shown in order to impose liability under Section 504 of the Rehabilitation Act. The court of appeals reasoned that the reference in the Rehabilitation Act "to 'discrimination' must require . . . something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist." *Id.* at 1170. The Eighth Circuit extended this ruling to Title II of the ADA in *Hoekstra v. Independent*

Sch. Dist. No. 283, 103 F.3d 624, 626-27 (8th Cir. 1996), *cert. denied*, 520 U.S. 1244 (1997). "[I]n the context of educational services for disabled children," the Eighth Circuit concluded in *Hoekstra* that "a showing of gross misjudgment or bad faith . . . is necessary to [recover monetary damages] on an ADA claim." *Id.* at 627; *accord Sellers v. School Bd. of City of Manasas, Va.*, 141 F.3d 524, 529 (4th Cir.), *cert. denied*, 119 S. Ct. 168 (1998).

In *Ferguson v. City of Phoenix*, 157 F.3d 668, 675-76 (9th Cir. 1998), the Ninth Circuit held that regardless of whether an award of compensatory damages under Section 504 and Title II of the ADA requires a showing of "deliberate indifference" or "discriminatory animus," the plaintiffs failed to show that the City's conduct rose to either standard. In *Ferguson*, the court held that the City's failure to correct its 9-1-1 services for the hearing impaired "appear[ed] to be no more than at times some not uncommon bureaucratic inertia as well as some lack of knowledge about DOJ's Manual's requirements." *Id.* at 675. The court noted that there was no

> actual showing of inadequate training and nothing to put the City on notice of any inadequacy. Further, . . . there was an internal investigation into the level of [the City's] 9-1-1 service followed by diligent effort . . . to upgrade its services.

Id. at 675-76. In short, the court concluded, there was simply no showing of "bad faith on the part of the City." *Id.* at 675-76; *see also Memmer v. Marin County Courts*, __ F.3d __, 1999 U.S. App. LEXIS 3333, *9-*12 (9th Cir. March 3, 1999) (rejecting a visually impaired individual's damage claim under Title II of the ADA because there was "no evidence of the discriminatory intent necessary . . to recover monetary damages").

Finally, in *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214, 1219 (11th Cir. 1992), the Eleventh Circuit found no error in the district court's jury instructions informing the jury that an award of damages under Section 504 required the plaintiff to prove that her "constructive dismissal" from the defendant college due to its alleged hostility to her schizophrenia "was the result of intentional discrimination or discriminatory animus." Elaborating, the court of appeals held that, under either standard, "[a]s a general matter, good faith attempts to pursue legitimate ends are not sufficient to support an award of compensatory damages under section 504." In *Wood*, the jury returned a verdict in favor of defendant.

The above cases stand in stark contrast to the Second Circuit's decision here. Like the defendants in *Marvin H.*, *Hoekstra*, *Ferguson*, *Memmer* and *Wood*, the Board was found to have acted reasonably. The Board hired a noted expert and attempted to comply with Section 504 and the ADA's requirements, finding out only after a long and complicated factual trial that its conclusions with respect to the plaintiff were — in the court's view — legally deficient. To our knowledge, only the Second Circuit holds such conduct to amount to "deliberate indifference" and, therefore, to constitute "intentional discrimination."

One cannot reasonably conclude that the Board intentionally violated the ADA by denying Ms. Bartlett's request for accommodations. Under the ADA, it is permissible for

> organizations that administer tests . . . to require individuals with disabilities to provide . . . appropriate documentation . . . of their disabilities

> and of any modifications or aids that would be required,

so long as the documentation requirements are not "unreasonable." 28 C.F.R. Part 36, App. B at 643 (1997); *see also Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432, 437 (6th Cir. 1998). If the documentation requested by a Board is reasonable, the Board has not violated the ADA in requesting the documentation. By an extension of this reasoning, a Board does not violate the ADA in its evaluation of an applicant's documentation so long as the Board acts reasonably in reviewing the documentation and reaching its decision. The New York Board unquestionably met that standard here.

The New York Board requested appropriate documentation in this case and then considered everything that Ms. Bartlett submitted. The documentation was reviewed not only by the Board, but also by an independent expert on learning disabilities, Dr. Frank Vellutino. The district court concluded that the Board acted reasonably in reviewing the documentation, in selecting Dr. Vellutino as its expert consultant, ***and*** in concluding that Ms. Bartlett does not have a learning disability that would entitle her to testing accommodations. App. 109a, 111a-112a, 132a-133a.

This should have been the end of the court's analysis. Having concluded that the Board acted reasonably and rationally not only in its consideration of Ms. Bartlett's request for accommodations, but also in the conclusion that it reached, the district court should have entered judgment in the Board's favor. The Board's decision was entitled to

deference.[7] But even if no deference is given to the Board's decision, the Board clearly should not have been subjected to an award of compensatory damages based upon a finding of intentional discrimination.

If left standing, the decision below will inevitably compel many licensing boards and testing agencies to accept any documented claim of disability, no matter how tenuous the documentation, lest they face the risk of liability. Licensing boards and testing organizations evaluate accommodation requests from thousands of individuals every year. It is imperative that these entities understand what is required of them under the disability laws, that these standards be uniform, and that monetary sanctions not attend reasonable and good faith decisions regarding the existence of a qualifying disability or the appropriateness of a particular accommodation. This Court's intervention is therefore needed to create uniform standards of liability and to inform regulated parties what conduct will result in a damages award under Section 504 and the ADA.

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7. *See, e.g.*, *Garro v. State of Connecticut*, 23 F.3d 734, 736 (2d Cir. 1994); *Jacobsen v. Tillmann*, 17 F. Supp. 2d 1018, 1024-25 (D. Minn. 1998); *cf. Zukle v. Regents of the Univ. of California*, __ F.3d __, 1999 U.S. App. LEXIS 2702, *16-*22 (9th Cir. 1999) (holding that, under the ADA and Rehabilitation Act, the decisions of an educational institution regarding the appropriateness of requested accommodations are "entitled to deference") (citing *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Wynne v. Tufts Univ. Sch. of Medicine*, 976 F.2d 791, 795 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1994); *McGregor v. Louisiana State Univ.*, 3 F.3d 850, 859 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994); *and Doe v. New York Univ.*, 666 F.2d 761, 776 (2d Cir. 1981)); *Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432, 436 (6th Cir. 1998) (same).

CONCLUSION

The New York Board's petition for a writ of certiorari should be granted, preferably to address all issues raised in the Petition, but at a minimum to resolve the conflict in the Circuits regarding the appropriate standard for awarding compensatory damages under Title II of the ADA and Section 504 of the Rehabilitation Act.

Respectfully submitted,

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